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IN THE

Supreme Court of the United States

October Term, 1995

LAWTON M. CHILES, JR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Counsel of Record
ANA CRISTINA MARTINEZ
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(904) 488-9935

PARKER D. THOMSON
Special Assistant Attorney General
CAROL A. LICKO
Special Assistant Attorney General
One S.E. Third Avenue, Suite 1700
Miami, FL 33131
(305) 350-7200

COUN SEL FOR THE STATE OF FLORIDA
AND GOVERNOR LAWTON M. CHILES, JR.

Additional counsel listed on the inside front cover

44 pp

PHYLLIS O. DOUGLAS
School Board of Dade County, Florida
1450 N.E. 2nd Avenue, Room 301
Miami, FL 33131
(305) 995-1304
COUNSEL FOR SCHOOL BOARD OF DADE COUNTY, FLORIDA

SARA A. PRICE
Public Health Trust Division
1611 N.W. 12th Avenue, West Wing 109
Miami, FL 33136
(305) 585-1313
COUNSEL FOR DADE COUNTY PUBLIC HEALTH TRUST DIVISION

W. DEXTER DOUGLASS
Room 209, The Capitol
Tallahassee, FL 32399-0001
(904) 488-3494
COUNSEL FOR GOVERNOR LAWTON M. CHILES, JR.

QUESTIONS PRESENTED FOR REVIEW

The complaint of the State of Florida and other petitioners seeks a declaratory judgment as to legal rights and obligations and either injunctive or restitutionary relief from costs imposed on them by national policies that have allowed the influx of huge and disproportionate numbers of illegal aliens into a small minority of states. The District Court found that Florida's "tremendous financial burden" was attributable to national policies and that there was no realistic prospect of relief through the national political process, but nevertheless dismissed the complaint. The Court of Appeals affirmed.

The Questions Presented are:

1. Whether the respondent officials of the national government violate Article IV, § 4 and the Tenth Amendment when they pursue policies that permit exorbitant numbers of illegal aliens to enter a tiny minority of states, and fail to make equitable restitution of the huge and disproportionate costs thereby imposed on those states and their political subdivisions.

2. Whether a claim that the Attorney General and other officials of the national government have violated the immigration laws by adopting and pursuing a general policy that is so extreme as to amount to an abdication of statutory responsibilities presents a question committed to agency discretion by law.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs and appellants in the court below):

Lawton M. Chiles, Jr., Governor of Florida; the State of Florida; the Dade County Public Health Trust Division, an agency and instrumentality of Dade County, a political subdivision of the State of Florida; the School Board of Dade County, Florida.

Respondents (Defendants and appellees in the court below):

The United States of America; Janet Reno, Attorney General of the United States; Doris Meissner, Commissioner of the Immigration and Naturalization Service ("INS"); Jennifer Nelson, Acting Regional Administrator of the Southern Regional Office of the INS; Walter D. Cadman, District Director of the Miami District Office of the INS; Donna E. Shalala, Secretary, United States Department of Health and Human Services.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is set forth in Appendix A and is reported at 69 F.3d 1094.

The decision of the United States District Court of the Southern District of Florida is set forth in Appendix B and is reported at 874 F. Supp 1334.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on November 8, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are Article IV, United States Constitution; Tenth Amendment, United States Constitution; and 8 U.S.C. § 1103(a). These provisions are set forth in Appendix C.

STATEMENT OF THE CASE

1. Nature of the Controversy

The national government possesses exclusive and plenary power over immigration. The sources of this power include not only the Naturalization Clause, but also, *inter alia*, the Commerce Clause, the war power, and the Guarantee

Clause.[1] This exclusive national power over immigration prevents the states from excluding or deporting undocumented aliens, regardless of the costs imposed. *See Plyler v. Doe,* 457 U.S. 202, 242 n.1 (1982) (dissenting opinion of Burger, C.J.); *see generally Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1876). Acting under its exclusive power, Congress has enacted a comprehensive statutory scheme regulating immigration. One statute, 8 U.S.C. § 1103, provides that the Attorney General ". . . *shall* have the power and *duty* to control and guard the boundaries and borders of the United States against the illegal entry of aliens . . . ."

Over the years, federal officials have acknowledged the failure of national policies to respond effectively to a swelling tide of illegal immigration. In 1981, Attorney General William French Smith confessed that the United States had lost control of its borders. (App. D-14, par. 41) At about the same time, the United States conceded in litigation that the onslaught of undocumented aliens constituted an invasion of the state of Florida within the meaning of Article IV, § 4. *See Louis v. Nelson*, 544 F.Supp. 973, 975 (S.D. Fla. 1982). Despite sporadic promises of corrective action, Florida continues to be overwhelmed with undocumented aliens.

Illegal immigration imposes enormous costs on certain state governments and their subdivisions. Those costs are not distributed proportionately. The population of illegal immigrants is overwhelmingly concentrated in just seven states.[2] Those seven states incur exorbitant costs, while the

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[1]Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. Rev. 1597, 1608–09 (1995) (citing cases).

[2]*See* Clark, Passel, Zimmerman & Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (1994) (hereinafter cited as "*Urban Institute Report I*"). Table 1.1 at p.5 demonstrates that 86% of undocumented aliens live in Florida, California, New York, Texas, Illinois, New Jersey, and Arizona.

other 43 pay little or nothing. Furthermore, the national government actually collects an estimated $3.37 billion per year in taxes paid by undocumented aliens.[3]

The theory of this suit is that respondent officials have breached statutory and constitutional obligations to safeguard the borders of the United States; that by abdicating their enforcement responsibilities, they have effectively commandeered the seven impacted states and their local governments to deal with a problem arising within the exclusive power of the national government; and that they have thereby compromised the political integrity of the most disproportionately burdened states in violation of basic principles of constitutional federalism, Article IV, § 4, and the Tenth Amendment. This theory echoes the position taken by five Justices of this Court in *Plyler v. Doe*, *supra*, which held that the states are constitutionally obliged to provide free public education to illegal alien children:

> It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. *If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burden of their presence here.*[4]

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[3]Passel, *Immigrants and Taxes: A Reappraisal of Huddle's "The Cost of Immigrants"* (1994) (hereinafter cited as "*Urban Institute Report II*"), Table 8.

[4]457 U.S. at 242 n.1 (Burger, C.J., dissenting) (emphasis added). Chief Justice Burger's opinion was joined by Justices White, Rehnquist, and O'Connor.

(continued...)

2. Summary of Facts

As a result of the national government's massive and persistent failure to enforce the immigration laws, there are an estimated 3.4 million undocumented aliens in the United States.[5] Their presence here reflects an obvious failure of national policy to maintain the security of the nation's borders.[6] Effective deportation proceedings are rare. Other efforts to implement statutory immigration policies are similarly minimal. For example, despite Congress' intent to make "the threat of sanctions against employers who hire illegal aliens . . . the cornerstone of the Immigration Reform and Control Act of 1986," enforcement actions against employers have been "virtually nonexistent." Note, *supra,* n.5, at 1644.

The Immigration and Naturalization Service estimates that at least 345,000 illegal aliens currently reside in Florida. (App. D-15, par. 42) Petitioners believe, and have alleged, that the number is actually much higher and will continue to grow in view of the unsettled political climate in the Caribbean and the accommodating policies of the United States Government. (App. D-15, par. 42)

(...continued)
Justice Powell also acknowledged that economic burdens imposed by illegal immigration should be shared by the national government. *Id.* at 240–41.

[5]*Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 Harv. L. Rev. 1643, 1645 n. 8 (citing an estimate by the General Accounting Office) (hereinafter, "Note").

[6]*See, e.g., Administration's Proposals on Immigration and Refugee Policy, 1981: Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess., at 6 (1981) (statement of William French Smith, Attorney General of the United States) ("We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively.").

Illegal immigration into Florida has caused repeated crises: overburdened school systems, increased crime, and heightened demand for costly emergency medical care. Florida has estimated its annual expenditures for undocumented aliens are at least $884 million per year.[7] (App. D-5, par. 11) But *Urban Institute Report I, supra, n. 2*, determined that Florida's actual outlays for education, emergency medical services, and incarceration were much *higher* than the state's estimates. (*Id.*, pp. 56, 89, 128) That study concludes, for example, that Florida's educational expenditures on behalf of undocumented aliens amounted to $424 million for 1993–94 alone. (*Id.*, p. 11) The burdens at the local level are also immense. Petitioner Dade County School Board expended about $1 billion in providing education to aliens from 1989–1994. (App. D-24, par. 55)[8] Petitioner Dade County Public Health Trust estimates it expended at least $102 million to provide medical care for undocumented aliens during the three-year period 1990–93. (App. D-24, par. 55)

While illegal immigration imposes immense financial burdens on Florida and its political subdivisions, *Urban Institute Report II, supra*, n. 3 — a study commissioned for the Department of Justice and United States Office of Management and Budget — establishes that the national government actually makes money by reason of its non-enforcement of the immigration laws. The report found that the United States annually collects $3.37 billion in taxes from undocumented aliens. Since Florida has an estimated 9.529% of the nation's

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[7]Florida's study, *The Unfair Burden: Immigration's Impact on Florida* (1994), was prepared by the Executive Office of the Governor and the Florida Advisory Council on Intergovernmental Relations. This report was appended to the complaint as Exhibit A. A copy has been lodged with this Court.

[8]The county's records do not distinguish between expenditures on legal and undocumented alien school children, because *Plyler v. Doe* requires it equally to provide free public education to both.

undocumented aliens, it could be reasonably calculated that undocumented aliens living in Florida annually generate over $355 million in revenues to the national government. By contrast, the national government reports annual budget expenditures for *all* enforcement of the immigration laws of only a fraction of the amount the United States itself receives from undocumented aliens.[9] Noting that the United States Government actually profits from its plight, Florida has made repeated pleas for help to both Congress and the Executive Branch. As expressly recognized by the District Court, those pleas have proved unavailing. (App. B-23.)

3. Proceedings Below

A. Florida's Complaint

On April 11, 1994, petitioners filed suit against respondents in federal District Court. The complaint, set forth in Appendix D, alleged that respondents' policies, actions, and inactions violated both constitutional and statutory duties to protect Florida and its political subdivisions against an unabated onslaught of illegal immigration — once characterized by the national government itself as an invasion — that imposes enormous economic and political costs and destroys lines of political accountability within the state.

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[9]The Budget of the United States Government, attached as an Appendix to respondents' brief to the Court of Appeals, shows total expenditures for these purposes of $1.625 billion in 1994, $1.785 billion (est.) in 1995, and $2.252 billion (est.) in 1996 (at 646,647). Respondents' brief to the Court of Appeals trumpeted "total Federal government costs relating to the Haitian crisis during 1992 and 1993 exceeding $200 million," a small fraction of Florida's costs devolving from the national government's failure to stem illegal immigration.

(i) The Constitutional Claim

Petitioners' principal constitutional claims were framed by Count IV of the complaint. (App. D-36) Based directly on Article IV, § 4 (the Guarantee and Invasion Clauses) and the Tenth Amendment, Count IV alleged that respondents' policies had permitted a deluge of illegal immigration, against which Florida is constitutionally barred from protecting itself, that constitutes an "invasion" within the meaning of Article IV, § 4, and otherwise reflects a breach of duty owed to the states under basic principles of constitutional structure and the Tenth Amendment. Count IV further alleged that, because petitioners have no practical or constitutional alternative but to absorb these huge costs attributable to the national policy of accommodating illegal immigration into the state, respondents' policies have fundamentally impaired Florida's sovereign rights and interests in violation of the Guarantee Clause and the Tenth Amendment, as construed by this Court in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992). By effectively coercing Florida to bear the costs of national immigration policy, the national government has conscripted both the State's resources and its legislative processes, while obscuring lines of political accountability.

(ii) The Statutory Claim

Count II of the complaint was brought under the Administrative Procedure Act, 5 U.S.C. §§ 702 and 706, and sought relief from respondents' arbitrary and capricious failure to perform duties imposed by the immigration laws. (App. D-30) The plainest of the relevant statutes, 8 U.S.C. § 1103, provides specifically that it *"shall"* be the "*duty*" of the Attorney General to take necessary action to "control and guard the boundaries and borders of the United States against the illegal entry of aliens . . . ." (Emphasis added.) The complaint alleged that respondents' enforcement policies

amounted to an abdication and default of statutory duty and thus were actionable under Section 702, which authorizes actions against officials who "fail to act in an official capacity," and under Section 706, which authorizes the courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "set aside" agency action and inaction that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10]

(iii) Relief Sought

With respect to both their constitutional and statutory claims, petitioners requested (i) a declaratory judgment and (ii) an injunction directing respondents *either* to alter their substantive policies involving illegal immigration in such a way as to satisfy constitutional and statutory obligations *or*, alternatively, to make equitable restitution of the amounts that petitioners are effectively required to spend as a result of respondents' default.

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[10]The complaint filed in the District Court included two additional counts. Count I sought declaratory and injunctive relief ordering the Attorney General to adopt and issue regulations implementing a federal statute providing for limited reimbursement of states — not to exceed $35 million annually — for costs of meeting "immigration emergencies." *See* 8 U.S.C. § 1101, as amended by Pub.L. 99-603, Pub.L. 101-649, and Pub.L. 102-140. This statute remained inoperative for lack of implementing regulations for seven years. After institution of this action, regulations were issued, mooting this Count.

Count III asserted constitutional claims, pressed in the Court of Appeals but not presented to this Court, that statutory limitations on the Medicaid and AFDC programs — which disproportionately deny Florida and a handful of other states reimbursement for expenditures on needy residents because a relatively large number of those residents are undocumented aliens — unconstitutionally discriminate against the state in violation of the Spending Clause (Article 1, § 8, cl. 1 of the Constitution) and other constitutional provisions guaranteeing equality among the states. The District Court found that Count III presented a nonjusticiable political question. The Court of Appeals affirmed (App. A) .

Petitioners do *not* seek review in this Court of the questions presented by Counts I and III of their complaint.

(App. D-39) The complaint acknowledged that "a broad scale injunction commanding the defendants to protect Florida's borders from an invasion of aliens might raise troubling issues of judicial power." (App. D-39) It asserted, however, that "no such issue would be raised by a mandatory injunction compelling the provision of ongoing restitution as an alternative remedy until such time as defendants bring their enforcement policies into compliance with applicable law." (App. D-39) The complaint made clear that restitution would depend on proof by petitioners that they had expended specific sums on behalf of undocumented aliens and that the expenditures were for basic and unavoidable services necessary for the preservation of public health, safety, and welfare — most notably education (which petitioners are required to provide under *Plyler v. Doe*), essential medical care, and criminal incarceration.[11]

(iv) Basis for Jurisdiction in the District Court

Petitioners invoked the jurisdiction of the District Court pursuant to 5 U.S.C. § 702, *et. seq.*, 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201 and 2202. (App. D-2)

B. The Ruling of the District Court

The District Court dismissed the complaint. The court's order recognized that Florida is "subject to a tremendous

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[11]After Florida filed its complaint, California, Arizona, Texas, New York and New Jersey filed suits in federal courts. The lower court rulings in these cases, relying *inter alia* on the District Court's decision in this case *(Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994), granted the government's motions to dismiss. All of these decisions have been appealed. *See California v. United States, appeal pending* No. 9 5-55490 (9th Cir.); *Arizona v. United States*, appeal pending, No. 95-15980 (9th Cir.); *Padavan v. United States, appeal pending*, No. 95-6156 (2d Cir.); *Texas v. United States, appeal pending*, No. 95-40721 (5th Cir.); *New Jersey v. United States, appeal pending*, No. 95-5685 (3d Cir.).

financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws." (App. B-23) The court also acknowledged that petitioners' costly efforts to meet that burden did not result from a "choice" in any meaningful sense but was the result of a practical compulsion:

> [A]ny choice Florida has is, in essence, a Hobson's choice. The State of Florida is presented with the following dilemma: If Florida chooses not to provide services to illegal aliens including closing schools, emergency rooms, etc., the impact on the health, safety and welfare of its citizenry could be potentially devastating. If, on the other hand, Florida chooses to provide the services, the cost of these services could cripple the State of Florida.

(App. B-21, n.19) In addition, the District Court found virtually no prospect that the national political process would relieve the burden that Florida "is being unfairly forced to bear." (App. B-23)

Nevertheless, the District Court ruled that the complaint failed to state a claim on which relief could be granted. The court found petitioners' constitutional claims asserted in Count IV to be barred by the political question doctrine, because it could not identify judicially manageable standards by which to determine when illegal immigration and its associated costs invaded the state's sovereignty. It also ruled as a matter of law that Florida suffered no coercion in violation of the Tenth Amendment, because Congress had not enacted legislation mandating state action: "In the instant case, Congress has adopted the policies themselves and did not order any action on the part of the states." (App. B-21) As to the statutory claims

of Count II, the District Court held that enforcement of the immigration laws was committed to agency discretion by law, and thus unreviewable, notwithstanding the allegation that Attorneys General past and present had abdicated statutory duties.

C. The Ruling of the Court of Appeals

On expedited review, the Eleventh Circuit Court of Appeals affirmed. Agreeing with the District Court, it ruled that Count IV, insofar as it was based on the Guarantee and Invasion Clauses, presented a nonjusticiable political question. (App. A-4) The Court of Appeals also found as a matter of law that Florida's burdens were "not the product of federal coercion of the kind which violates the Tenth Amendment." (App. A-5) The Court of Appeals upheld dismissal of the Count II statutory claims on the ground that enforcement or nonenforcement of the immigration laws was committed to the Attorney General's unreviewable discretion. (App. A-3)

REASONS FOR GRANTING THE WRIT

I. THIS CASE HAS PROFOUND IMPLICATIONS FOR THE ALLOCATION OF POWERS AND THE STRUCTURE OF CONSTITUTIONAL FEDERALISM.

The importance of the issues presented by this case is self-evident. By its own admission, the national government has lost control of the nation's borders. Some 15 years ago, the government recognized that the result was tantamount to an invasion of the state of Florida. *See Louis v. Nelson*, *supra.* Yet respondents' efforts to protect the state against illegal immigration and its attendant burdens are as flaccid and porous today as they were a decade ago. Respondents' sole defense, throughout this lawsuit, has been that their policies, actions,

and inactions are immune from legal challenge. With respect to the constitutional allocation of powers, this case thus presents clear legal questions of foremost importance: whether constitutional and statutory provisions charging the national government to secure the states against "invasion" and to guarantee the integrity of their political processes, and imposing a duty to "control and guard the boundaries and borders of the United States against the illegal entry of aliens," mean what they say and, if so, whether they are judicially enforceable.

The implications of the case for constitutional federalism are, if anything, even more urgent. Florida is one of seven states forced to absorb the overwhelming costs of failed national immigration policy. As a consequence of the national government's virtual abdication of constitutional and statutory responsibilities, there are hundreds of thousands of illegal immigrants living within the state; illegal immigration into the state continues unabated; and the economic costs to the state are both staggering and, for all practical purposes, inescapable. In the starkest practical terms, this case presents the question whether officials of the national government can impress a few states to bear such huge, disproportionate, and wholly inequitable financial costs. In terms of constitutional structure, the question is whether officials of the national government may so distinctively coerce a small minority of states, dominate their legislative agendas, and transfer political accountability for state policies enacted in response to *de facto* national compulsion.

The practical importance of the legal issues in this case is heightened by the absence of political mechanisms or incentives by which the underlying legal and constitutional deficiencies might be righted. Because illegal immigration brings net benefits to the federal treasury of roughly $3.37 billion annually, there is little or no financial incentive for the

national government to discharge its responsibilities concerning illegal immigration. Indeed, it is telling that the national government, by its own account, spends per year far less than the undocumented aliens pay it in its pathetically inadequate efforts to check illegal immigration. In short, the national government is a net beneficiary of illegal immigration; a small minority of states bear the crushing financial burden; and the other 43 or 44 states have every political incentive to let that minority of states absorb the costs of national policy.[12] The situation speaks for itself: this Court is the only forum in which the vital questions of constitutional structure presented by this case can be addressed. "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [this Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *United States v. Lopez*, __ U.S. __, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., joined by O'Connor, J., concurring).

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[12]That illegal immigrants produce a net financial gain for the national government and that the costs attributable to them for education, medical services, and incarceration far exceed state and local revenues generated from them in the seven most affected states does not seem open to serious question. *See, e.g.*, Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. Rev. 1509, 1539 & n.126 (1995) (citing Fix & Passel, *Immigration and Immigrants: Setting the Record Straight* 6 (1994)); Legomsky, *Immigration, Federalism and the Welfare State*, 42 UCLA L. Rev. 1453, 1470 (1995) (citing *Urban Institute Report I*, chs. 3-5).

II. WHETHER OFFICIALS OF THE NATIONAL GOVERNMENT ARE CONSTITUTIONALLY OBLIGED TO PROTECT THE STATES AGAINST A DE FACTO INVASION OF UNDOCUMENTED ALIENS AND TO PRESERVE THE INTEGRITY OF THE STATES' POLITICAL PROCESSES, WHEN THE STATES ARE CONSTITUTIONALLY BARRED FROM DOING SO, IS AN IMPORTANT QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

In light of both the magnitude of the stakes and the fundamentality of the underlying principles, questions concerning respondents' obligations deserve review by this Court.

A. Contrary To The Conclusion Of The Court Of Appeals, The National Government And Its Officials Are Constitutionally Obliged To Secure The States Against Invasion And Otherwise Protect The Integrity Of Their Political Processes From Gross And Disproportionate Burdens Imposed By Illegal Immigration.

Article IV, § 4 includes two clauses, the Guarantee Clause and the Invasion Clause, both of which speak in mandatory terms and impose duties, running to the states, on the national government: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." The Guarantee Clause requires the national government to preserve the state autonomy necessary to foster republican government, and it forbids interference by the national government that could destroy a state's republican character. Shapiro, *Federalism: A Dialogue* 111 (1995); Merritt, *The Guarantee Clause and State Autonomy: Federalism For A Third Century*, 88

Colum. L. Rev. 1, 25 (1988).[13] In essence, the Clause ensures each state a form of government that is accountable and therefore responsive to the will of its citizens. The Invasion Clause imposes on the national government the additional affirmative duty to protect the states against foreign invasions, including those of undocumented aliens whom states may neither exclude nor deport.

Both Clauses, as this case illustrates, are crucial supports of the federalism contemplated by the Constitution:

> [The] federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experiment in government; and it makes government more responsive . . . .

Gregory v. Ashcroft, *supra*, 501 U.S. at 458. All of the "numerous advantages" of constitutional federalism depend on the national government's respecting and maintaining the political integrity of the states.

Predictably, and contrary to its own argument in *Louis v. Nelson*, the national government asserts that the Invasion Clause applies only to military invasions. But the dual guarantees of a republican form of government and protection against invasion must be read purposively and conjunctively. Large and continuous influxes of undocumented aliens have

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[13]Professor Merritt's article is cited numerous times in *New York v. United States* and *Gregory v. Ashcroft*. *See New York*, *supra*, 112 S. Ct. at 2408, 2418, 2424, 2433 and *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

placed severe burdens on Florida's educational, correctional, health care, and other systems; distorted the agenda of state and local legislative bodies; and thus blurred the lines of political accountability that a republican form of government requires. Respondents' effort to confine the scope of the Invasion Clause was rejected over a century ago in *The Chinese Exclusion Case*, 130 U.S. 581, 605–06 (1889) ("It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us"). *See also,* Shapiro, *supra*, at 111. The commands of Article IV, § 4 thus speak directly to the facts of this case.

Even apart from claims arising under Article IV, § 4, the Court of Appeals erred by failing to recognize that respondents owe duties to petitioners under basic principles of constitutional structure that apply when exclusive federal power precludes a state from acting to protect itself. Among the most crucial facts about this case is that petitioners are constitutionally precluded from defending themselves against illegal immigration and its attendant burdens. Florida is not constitutionally permitted to police its own borders, nor can it deport illegal immigrants who have settled there. *See, e.g., Henderson v. Mayor of the City of New York*, *supra*; *Plyler v. Doe*, *supra*, 457 U.S. at 242, n.1 (dissenting opinion of Burger, C.J.). Even state efforts to assist the national government's transparently ineffectual enforcement policy might well be preempted by federal laws. *See League of United Latin American Citizens v. Wilson*, 1995 WL 699583 (C.D. Calif. 1995) (holding important elements of California's Proposition 187 preempted by federal immigration law); *see generally Hines v. Davidowitz*, 312 U.S. 52 (1941) (finding federal preemption of state regulatory efforts by parallel provisions of federal immigration law) .

In a lengthening series of decisions, most recently including *United States v. Lopez*, *supra*, this Court has recognized that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, *supra*, 501 U.S. at 457, under which the Federal Government, in the exercise of its constitutional powers, must respect the sovereign integrity of the states and their political processes. "'[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.'" *Id.*, citing *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane v.Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).

This is a case, by no means unprecedented under the decisions of this Court, in which "the preservation of the States" as sovereign and independent political units—with their resources secure against impressment and their political agenda undistorted by the *de facto* coercion of outsiders — requires protective action by the national government. Although this Court has hesitated to read the Constitution as imposing affirmative, judicially enforceable obligations to render aid or enforce the law, *see, e.g., DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189 (1989), there are well-recognized exceptions. One important category involves cases in which the government has disabled individuals from protecting themselves and, in consequence, has assumed an obligation to provide specific protections. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("When a person is institutionalized — and wholly dependent on the State — it is conceded by petitioners that a duty to provide certain services and care does exist . . . ."); *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244–45 (1983) (holding that the Due Process Clause requires "the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police").

Because the exclusivity of federal power renders Florida and its political subdivisions impotent to protect themselves against illegal immigration, theirs is an analogous situation. *Cf. Collins v. Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 1069 (1992) (noting decisions premised on the theory that "the State owes a duty to take care of those who have been deprived of their liberty"). This Court should grant certiorari in this case to determine authoritatively whether the national government, having foreclosed state action, has assumed an obligation to provide minimally adequate protection against, or in the alternative to make equitable restitution of the costs imposed on Florida by, the huge and disproportionate onslaught of undocumented aliens.[14]

B. The Court Of Appeals Erred In Finding Petitioners' Claim Under The Guarantee Clause To Be Nonjusticiable.

The Court of Appeals erred in ruling that petitioners' claims under the Guarantee Clause, and possibly under the Invasion Clause as well, present nonjusticiable political questions. As *New York v. United States* expressly recognized, the decisions of this Court "suggest[] that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 112 S. Ct. at 2433. Justice O'Connor, writing for the Court in *New York*, also cited academic

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[14]On the facts of this case, there is no need for this Court to survey the precise line of demarcation beyond which illegal immigration becomes an invasion, the integrity of Florida's political process is impaired, or the enforcement policies of the national government can be deemed constitutionally deficient. Wherever the line might reasonably be drawn, the facts alleged show that the national government has crossed it. To resolve this case, it is enough to identify the controlling principles and hold what the facts show indisputably: that respondents' non-enforcement policies, coupled with their failure to make restitution of the costs that those policies have imposed, have violated the Constitution.

commentary asserting "that courts should address the merits of such claims, at least in some circumstances." Indeed, in *New York*, this Court assumed *arguendo* that the state's Guarantee Clause claims were indeed justiciable and addressed them, albeit rejecting them on the merits. *See id.* at 2432–33.

This Court's willingness to reach the merits of the Guarantee Clause claim in *New York* tracks an important distinction, long implicit in the case law, that points to the justiciability of the Guarantee Clause issue presented in this case. A claim brought by citizens under the Guarantee Clause to challenge the structure of government adopted within a state typically presents nonjusticiable political questions. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 7 How. 1, 12 L.Ed. 581 (1849). By contrast, a claim *by* a state or its elected representatives challenging outside coercion directed *against* the state and its political processes is and must be justiciable. *See, e.g., Coyle v. Oklahoma*, 221 U.S. 559 (1911); Merritt, *supra*, at 73–75. Sound policy supports this distinction. In cases involving coercion directed against the state by the national government, the national political process *patently* cannot be trusted to vindicate the principles underlying the Guarantee Clause. In such cases, including this one, judicial review is necessary to ensure that the Guarantee Clause does not become a constitutional dead letter.

This Court should grant the writ in this case both to protect the vitality of the Guarantee Clause and to clarify the principles differentiating those Guarantee Clause claims that are justiciable from those that are not.

III. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE THEORY OF FEDERALISM IMPLICIT IN THE CONSTITUTION AND IN DECISIONS OF THIS COURT, ESPECIALLY *NEW YORK v. UNITED STATES*.

Respondents' failure to make equitable restitution of the costs exacted by undocumented aliens' presence within the state has the practical effect of commandeering the state's political process to deal with the burdens that undocumented aliens impose.

New York v. United States specifically articulated the principles that ought to control this case. At issue in *New York* was a congressional statute requiring that states either enact legislation providing for the disposal of nuclear waste or take title to waste produced within their borders. This Court held that the statute offended the Tenth Amendment on two closely related grounds.

First, the challenged statute "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce'" a national program. 112 S. Ct. at 2420. Such commandeering, this Court reasoned, deprived the states of their constitutional role as distinct and independent sovereigns. The national government, the Court held, "may not conscript state governments as its agents." *Id.* at 2429.

The Court of Appeals erred in failing to apply that rationale to this case. The veritable "invasion" of undocumented aliens to which Florida is subject — as the District Court expressly recognized — has confronted petitioners with a practical necessity of legislating to provide costly services to them. The failure of federal enforcement policy produces a legal compulsion for the state to provide education to illegal immigrants under *Plyler v. Doe;* and in other cases the state's choice whether to act or not to act, to use

the District Court's terminology, is a Hobson's choice (App. B-21, n.19) — which, of course, is to say that it is no choice at all. In short, the national government's accommodation of illegal immigration, coupled with its failure to assume the states' financial costs in meeting the ensuing burdens, has produced a *de facto* compulsion of state legislative action comparable to that which *New York* condemns.

It is crucially significant that in this case, as in *New York*, the coercive pressure exerted by national policy is experienced uniquely by the states and their political subdivisions. What distinguished *New York* was that the practical compulsion to legislate arose from congressional action that was directly targeted at states *as* states. *See* 112 S. Ct. at 2420. This case is relevantly similar: the coercive pressure to provide services to undocumented aliens is a pressure that can *only* be felt by states and their political subdivisions.

A second basis for the decision in *New York* also applies to this case. *New York* reasoned that to allow the national government to impose *de facto* obligations to legislate regarding nuclear waste disposal would leave citizens uncertain where responsibility for the location of waste disposal sites lay — with Congress, which effectively coerced the states into legislating, or with state officials, who would have made the ultimate legislative decision, but would have done so only in response to congressional coercion. "Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 112 S. Ct. at 2424.

The national government's failure to stem the flood of illegal immigration in this case, coupled with its failure to fund state expenditures necessitated by that flood, has an

accountability-diminishing effect that is even more acute than that at issue in *New York*. Compelled expenditures for the benefit of non-citizens, amounting to hundreds of millions of dollars annually, predictably tend to create a backlash of resentment directed at the *state*. California, a state suffering a similar immigration invasion, recently enacted a ballot initiative aimed, *inter alia*, at depriving illegal immigrants of vital public services — including the education mandated by *Plyler v. Doe*.[15] Florida, so far, has taken a different approach, acknowledging that it would be incompatible with this state's sovereign responsibilities and its own long-term interests to deny basic necessities to — and thus risk driving into crime and violence — a population that it cannot exclude and cannot eject. But what is constitutionally significant is that all political determinations made under such circumstances involve blurred lines of political accountability. As in *New York*, "federalism is hardly being advanced." 112 S. Ct. at 2432. *See also* Shapiro, *supra*, at 111–12. This Court should grant the writ in this case to clarify the principles of federalism reflected in the Constitution and in *New York* and to apply those principles in a case of great practical importance.

IV. THIS CASE PRESENTS IMPORTANT QUESTIONS, LEFT UNRESOLVED BY THIS COURT'S DECISIONS, ABOUT THE AVAILABILITY OF JUDICIAL RELIEF TO PROTECT THE INTEGRITY OF THE STATES WHEN THE POLITICAL SAFEGUARDS OF FEDERALISM ARE DEMONSTRABLY INADEQUATE.

Because the enormous costs of respondents' policies are thrust disproportionately onto only a few states, those states are

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[15]Most, though not all, of the provisions of Proposition 187 have been held unconstitutional by a federal district court. *See League of United Latin American Citizens v. Wilson*, *supra*.

unable to protect themselves in the national political process. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), specifically anticipated that judicial enforcement of federalism values might sometimes be necessary under principles "tailored to compensate for possible failings in the national political process rather than to dictate 'a sacred province of state autonomy.'" *Id.* at 554.

This is a case in which "failings in the national political process" are self-evident, easily explicable, and predictably ineradicable by political means. *See* Note, *supra,* at 1646–48. Clearly, not every loss that a state may suffer can be ascribed to process failure. In order to be judicially manageable, the test for identification of failure of the political process must rely on the presence of structural factors — such as those in *Baker v. Carr*, 369 U.S. 186 (1962) — that make it virtually impossible for normal political bargaining to occur or for process failures to be self-correcting over time. This case would satisfy any such standard. Political discussion begins from a starting point in which six or seven states have *already* been impressed to serve the interests of the majority of the states, and the benefitted majority have no political incentive whatsoever to alleviate the minority's inequitable burden.

This Court should grant the writ of certiorari in this case to vindicate and clarify the principles reflected in *Garcia*: basic principles of constitutional federalism require judicial protection of the integrity of the states and their political processes in cases involving plain and predictable "failings in the national political process" that, for structural reasons, are unlikely to be self-correcting over time.

V. THIS CASE PRESENTS IMPORTANT QUESTIONS ABOUT THE EXISTENCE OF DUTIES UNDER THE NATIONAL IMMIGRATION LAWS AND THE RIGHT TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT AND ABOUT THIS COURT'S DECISION IN *HECKLER v. CHANEY.*

Under 5 U.S.C. § 706, it is the duty of the federal courts to review agency action and inaction and to set aside agency policies that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Failure to take enforcement action is in principle subject to judicial review. *See id.* ("The reviewing court shall ... (1) compel agency action unlawfully withheld or unreasonably delayed."). In this case, it is indisputable that petitioners' complaint states a claim within the plain language of § 706: respondents' policy of abdication and default with respect to enforcement of the immigration laws is arbitrary, capricious, and contrary to law.

In holding that petitioners failed to state a claim on which relief could be granted, the Court of Appeals relied on 5 U.S.C. § 701, another provision of the Administrative Procedure Act, which creates an exception to reviewability for cases in which "agency action is committed to agency discretion by law." (App. A-3) That holding was error, which this Court should correct.

It is well settled by decisions of this Court that action going beyond the bounds of legal discretion — even where some scope for the exercise of discretion exists — is not committed to agency discretion by law. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). In this case, petitioners explicitly pleaded that the Attorney General and her co-defendants have exceeded the bounds of any statutorily conferred discretion and failed to meet the *duty* imposed, *inter alia*, by 8 U.S.C. § 1103. In upholding dis-

missal, the Court of Appeals apparently relied on this Court's determination in *Heckler v. Chaney*, 470 U.S. 821 (1985), that *non*enforcement decisions of administrative agencies are "presumptively unreviewable." 470 U.S. at 832.[16] But *Heckler*, while creating a presumption denying reviewability in relatively fact-specific cases of nonenforcement, pointedly stated that the Court did not confront "a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833, n.4.

In this case, the adoption of "'a general policy' that is so extreme as to amount to an abdication of . . . statutory responsibilities" is *precisely* what petitioners have alleged. And the question left open in *Heckler* — whether the presumption of nonreviewability applies in such a case — is crucial. For if the inapplicability of the presumption of unreviewability is recognized in cases involving "abdication of . . . statutory responsibilities" — as *Heckler* hinted but did not expressly hold — then the Court of Appeals certainly erred in concluding that "Congress intended whether the Attorney General is adequately guarding the borders of the United States to be 'committed to agency discretion by law' and, thus, unreviewable." (App. A-3) The Court of Appeals conclusion is belied by the very language of the statute on which petitioners' APA claim principally relies, 8 U.S.C. § 1103, which says explicitly that the Attorney General "shall have the . . . duty to

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[16]The reasoning of the Court of Appeals is not entirely transparent. The court asserts, without explanation, that "[t]he overall statutory scheme established for immigration demonstrates that Congress intended whether the Attorney General is adequately guarding the borders of the United States to be 'committed to agency discretion by law' and, thus, unreviewable. *See* 5 U.S.C. § 701(a)." At the end of this otherwise bare assertion, however, the Court of Appeals adds a "*cf.*" cite, not only to *Heckler v. Chaney* generally, but to a particular page of that opinion, 470 U.S. at 837, reiterating that a presumption of nonreviewability applies in actions challenging agency refusals to take enforcement action.

control and guard the boundaries and borders of the United States against the illegal entry of . . . aliens . . . ."

This language need not be construed to establish that the Secretary's enforcement responsibilities have no discretionary element; plainly they do. Nor does it imply that every shortfall — every entry by a single illegal alien — constitutes an actionable failure by the Secretary to perform her duty. But what the language clearly *does* establish is that the Secretary has a statutory "duty" that imposes legal constraints on the scope of her enforcement discretion; it is manifest both from the face of the statute and its legislative history[17] — if a presumption of nonreviewability does not end the analysis — that the Secretary could not, lawfully, abdicate the statutory policy of controlling illegal immigration and guarding the boundaries of the United States against illegal immigrants.

The Court of Appeals erred in holding otherwise, and this Court should grant the writ to correct this error. In addition, it is equally important for this Court to resolve the general question of administrative law, left open by *Heckler* and presented by this case, whether the presumption of non-reviewability applies in cases seeking review of policies of nonenforcement that amount to an abdication of statutory duty. As recognized explicitly by the leading administrative law treatise, 3 Davis & Pierce, *Administrative Law Treatise* § 17.4, p. 142 (3d ed. 1994), "[t]he many circuit court opinions that have applied the rebuttable presumption of unreviewability . . . announced in *Heckler* reflect continuing uncertainty and disagreement with respect to the scope of the presumption and the circumstances required to rebut the presumption." Among

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[17]The legislative history of 8 U.S.C. § 1103 confirms Congress's manifest intent to impose *duties* and to provide judicial review when the actions of the Attorney General or her delegates "transcend [the] limits of authority or abuse [the] discretion reposed in them." 1952 U.S.C.C.A.N. 1654, 1687 § 3.

the specific questions creating persistent confusion is "[w]hen, if ever, can a court" review a challenge to agency policy and provide a remedy "based on a judicial determination that the agency is consciously and systematically refusing to enforce a statute." *Id.* In light of the importance of this question and the confusion and uncertainty surrounding it, this Court should grant the writ of certiorari.

VI. THIS CASE PRESENTS IMPORTANT QUESTIONS ABOUT THE AVAILABILITY OF JUDICIAL RELIEF NECESSARY TO PRESERVE THE INTEGRITY OF CONSTITUTIONAL FEDERALISM AND PROTECT CONSTITUTIONAL RIGHTS.

From the inception of this case, respondents have protested that there are no judicially manageable standards by which petitioners' claims might be resolved and that the framing of relief would be beyond judicial competence. That this case presents important questions about the necessity and manageability of judicial remedies is a reason for this Court to grant the writ of certiorari, not to deny it.

A. Fashioning Adequate Relief In This Case Does Not Lie Beyond Judicial Competence.

Petitioners' prayer for relief is carefully framed in the alternative. Petitioners have referred consistently to three forms of remedy: (i) declaratory relief; *and* (ii) an injunction against the continued flouting by respondents of their statutory and constitutional obligations; *or* (iii) equitable restitution of the costs imposed on petitioners by respondents' unlawful policies. Petitioners have never denied that a mandatory injunction might give rise to problems of judicial manageability. But an order to provide equitable restitution does not even arguably intrude on political or foreign policy prerogatives of Congress or the Executive Branch. *Cf. Gilligan v. Morgan*, 413 U.S. 1

(1973) (finding a suit seeking injunctive relief against the Ohio National Guard to be non-justiciable), with *Scheuer v. Rhodes*, 416 U.S. 232, 249 (1974) (holding that *Gilligan v. Morgan* did not bar a suit for damages arising from the same events).

As petitioners have maintained throughout, an appropriate and judicially manageable remedy in this case would be for a court to declare the law and to leave to respondents the choice, in the first instance, of how to meet their obligations: either by (i) enforcement actions adequate to satisfy respondents' obligations under the Constitution and laws of the United States to abate the ongoing violation that their policies have caused, or (ii) provision of equitable restitution. Implementation of full relief need not be immediate. *Cf. Powell v. McCormack*, 395 U.S. 486 (1969), specifically so holding. Moreover, the approach taken in *Brown v. Board of Education (II)*, 349 U.S. 294 (1955) illustrates that a remedial order can legitimately anticipate good faith efforts by respondents to craft the most appropriate remedy. Finally, and simply as a matter of equity, dollar-for-dollar restitution of expenditures specifically proved by petitioners would go far in redressing what has been wrongfully exacted from Florida as a sovereign state in our federal system.

B. A Judicial Remedy Is Not Barred By Sovereign Immunity.

Section 702 of the Administrative Procedure Act expressly waives the sovereign immunity of the United States in suits "seeking relief other than money damages." There can be no doubt that both injunctive and declaratory relief come within this waiver. And *Bowen v. Massachusetts*, 487 U.S. 879 (1988), makes it equally clear that the equitable restitution sought in this case as an alternative remedy, if respondents do not otherwise conform their conduct to satisfy constitutional and statutory requirements, falls within the statutory waiver of sovereign immunity.

As *Bowen* expressly recognized, not all forms of monetary relief constitute "money damages." In particular, *Bowen* established that a suit is not for "money damages" and that the APA waiver of sovereign immunity applies when a plaintiff seeks, not compensation for a past wrong, but "the very thing to which he was entitled." *See* 487 U.S. at 895. Petitioners' claims for monetary relief fall precisely within this definition, since it is merely an alternative to a prospective order directing respondents to end their policy of abdicating constitutional and statutory enforcement duties.[18]

C. The Constitution Requires An Effective Remedy For Respondents' Constitutional Violations.

Although the APA waiver suffices, this is also a case in which the Constitution itself requires that the barrier of sovereign immunity give way. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court has recognized that the constitutional ideal of the rule of law requires legal remedies adequate to keep the government within the bounds of law.[19] *See* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1786–91 (1991). Sovereign immunity exists under the Constitution, not above or outside it, and at times the Constitution requires

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[18]A remedial analogy is suggested in the law of nuisance. A defendant may be ordered to abate a nuisance by whatever means would be effective to that end; this type of injunctive relief would there, as here, normally be preferred. But if the nuisance is not abated, then the alternative remedy is to require the defendant to absorb all costs attributable to the wrongdoing. *See generally* W. Page Keeton et al., *Prosser and Keeton on The Law of Torts*, 637–43 (5th ed. 1984).

[19]*See* 5 U.S. at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.").

sovereign immunity to yield. Just last Term, for example, *Reich v. Collins*, ___ U.S. ___, 115 S. Ct. 547, 549 (1995), expressly held that the Due Process Clause requires effective remedies for the coercive collection of taxes and accordingly mandates the availability of courts to provide those remedies, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding." In this case, as in *Reich*, the Constitution mandates that there must be some remedy — whether a judicial order to stem the tide of illegal immigration and the resulting constitutional violation or the alternative of equitable restitution — to vindicate the underlying constitutional right. This Court should grant the writ of certiorari in this case to clarify and reinforce fundamental principles concerning the appropriate role of courts and the necessary role of judicial remedies in the constitutional scheme.

CONCLUSION

For the above-stated reasons, this Petition for Writ of Certiorari should be granted, and the Court should allow petitioners to file their brief stating comprehensively why the decision of the Eleventh Circuit Court of Appeals should be reversed by this Court.

Respectfully submitted,

PHYLLIS O. DOUGLAS
Florida Bar No. 126915
School Board of Dade Co., FL
1450 N.E. 2nd Ave., Room 301
Miami, FL 33131
(305) 995-1304
Counsel for School Bd. of Dade Co., FL

SARA A. PRICE
Florida Bar No. 831425
Public Health Trust Division
1611 N.W. 12th Ave.
West Wing 109
Miami, FL 33136
(305) 585-1313
Counsel for Dade County Public Health Trust Division

W. DEXTER DOUGLASS
Florida Bar No. 0020263
Executive Office of the Governor
Room 209, The Capitol
Tallahassee, FL 32399-0001
(904) 488-3494
Counsel for Governor Lawton M. Chiles, Jr.

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LOUIS F. HUBENER
Counsel of Record
Assistant Attorney General
Florida Bar No. 0140084
ANA CRISTINA MARTINEZ
Assistant Attorney General
Florida Bar No. 0851655
OFFICE OF THE ATTORNEY GENERAL
The Capitol — Suite PL-Ol
Tallahassee, FL 32399-1050
(904) 488-9935

PARKER D. THOMSON
Special Asst. Attorney General
Florida Bar No. 081225
CAROL A. LICKO
Special Asst. Attorney General
Florida Bar No. 435872
One S.E. 3rd Avenue, Ste. 1700
Miami, FL 33131
(305) 350-7200
Counsel for the State of Florida and Governor Lawton M. Chiles, Jr.

(2) 95-1249

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IN THE

Supreme Court of the United States

October Term, 1995

LAWTON M. CHILES, JR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Counsel of Record
ANA CRISTINA MARTINEZ
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(904) 488-9935

PARKER D. THOMSON
Special Assistant Attorney General
CAROL A. LICKO
Special Assistant Attorney General
One S.E. Third Avenue, Suite 1700
Miami, FL 33131
(305) 350-7200

COUN SEL FOR THE STATE OF FLORIDA
AND GOVERNOR LAWTON M. CHILES, JR.

Additional counsel listed on the inside front cover

81pp

PHYLLIS O. DOUGLAS
School Board of Dade County, Florida
1450 N.E. 2nd Avenue, Room 301
Miami, FL 33131
(305) 995-1304
COUNSEL FOR SCHOOL BOARD OF DADE COUNTY, FLORIDA

SARA A. PRICE
Public Health Trust Division
1611 N.W. 12th Avenue, West Wing 109
Miami, FL 33136
(305) 585-1313
COUNSEL FOR DADE COUNTY PUBLIC HEALTH TRUST DIVISION

W. DEXTER DOUGLASS
Room 209, The Capitol
Tallahassee, FL 32399-0001
(904) 488-3494
COUNSEL FOR GOVERNOR LAWTON M. CHILES, JR.

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CHILES v. U.S.A

No. 95-4061.

Lawton M. CHILES, Jr., Governor of the State of Florida; State of Florida; Dade County Public Health Trust, an agency and instrumentality of Dade County, a political subdivision of the State of Florida, the School Board of Dade County, Florida, Plaintiffs—Appellants,

v.

UNITED STATES of America; Doris Meissner, Commissioner of the Immigration and Naturalization Service of the Department of Justice; Janet Reno, Attorney General of the United States; Jennifer Nelson, Acting Regional Administrator of the Southern Regional Office of the INS of the Department of Justice; Walter D. Cadman, District Director of the Miami District Office of the INS of the Department of Justice; Donna E. Shalala, Secretary of the United States Department of Health & Human Services, Defendants—Appellees.

NO. 90-3943

United States Court of Appeals,
Eleventh Circuit.

Nov. 8, 1995.

Appeal from the United States District Court for the Southern District of Florida. (No. 94-676-CIV-EBD), Edward B. Davis, Judge.

Before EDMONDSON and DUBINA, Circuit Judges, and CUDAHY*, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

In this expedited appeal, Florida alleges it is injured by the United States' failure to enforce the immigration laws. The State asserts claims under both the Administrative Procedure Act and the United States Constitution. Florida asks for equitable restitution of its unreimbursed expenses or for declaratory relief and an injunction requiring the United States to fulfill its statutory and constitutional duties. The district court dismissed all counts, concluding the claims presented nonjusticiable political questions. For the reasons as set forth in the district court's order and for the reasons set out below, we AFFIRM.

Count II

In Count II,[1] Florida sues the Attorney General under the APA for her failure to perform the duties imposed by the immigration laws. *See* 8 U.S.C. 1103(a); 1251(a). The district court dismissed this claim as a political question. We conclude that, to the extent Florida asks this court to construe the statutory responsibilities of the Attorney General, the claim is justiciable. *See Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166 (1986).

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* Honorable Richard D. Cudahy, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

[1]Count I is moot.

A. Standing

The Attorney General asserts Florida lacks standing to raise this claim.[2] On the redressibility component of standing, we recognize that the level of illegal immigration is dependent on many factors outside the control of the Attorney General. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41–43, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). But, because an order against the named defendants would offer some relief to Florida, we suppose that the State does have standing to raise this claim.

B. The Statutes

Assuming justiciability and standing, we–for much the same reasons as are expressed in the district court's order[3]–conclude that the district court properly dismissed this count. The overall statutory scheme established for immigration demonstrates that Congress intended whether the Attorney General is adequately guarding the borders of the United States to be "committed to agency discretion by law" and, thus, unreviewable. *See* 5 U.S.C. § 701(a); *cf. Heckler v. Chaney*, 470 U.S. 821, 838, 105 S.Ct. 1649, 1659, 84 L.Ed.2d 714 (1985).[4] And, Section 1251(a) expressly gives the Attorney General discretion whether to deport a particular alien.

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[2]The district court did not address this argument.

[3]While the district court dismissed this count as nonjusticiable, it did discuss whether Congress intended judicial review under Section 1103(a). *Chiles*, 874 F.Supp. at 1339–41.

[4]The part of the statute relied on by Florida would not justify even an allegation of complete abdication of statutory duties to go to trial. *Cf. Heckler*, 470 U.S. at 833 n. 4, 105 S.Ct. at 1656 n. 4.

Count III

Count III alleges that the Federal Medicaid and AFDC reimbursement programs unconstitutionally discriminate against the state in violation of the Spending Clause (Art. I, § 8) and "other constitutional provisions guaranteeing equality among the states." While initial spending decisions are exclusively the domain of Congress,[5] if a specific constitutional limit is exceeded judicial review is possible, even if the case involves foreign policy. *Cf. INS v. Chada,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). But, because no specific constitutional limit on the spending power has been exceeded by the reimbursement policies of AFDC and Medicaid, we conclude this count was properly dismissed. *See Buckley v. Valeo,* 424 U.S. 1, 88–90, 96 S.Ct. 612, 668, 46 L.Ed.2d 659 (1976); *South Carolina v. Katzenbach,* 383 U.S. 301, 323-25, 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1966) (states not protected by Fifth Amendment's equal protection guarantee). Florida must seek relief in Congress. *Cf. Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 549-53, 105 S.Ct. 1005, 1017-18, 83 L.Ed.2d 1016 (1985).

Count IV

Count IV alleges the United States violates the Guarantee and Invasion Clause (Art. IV, § 4) and the Tenth Amendment by forcing Florida to provide unreimbursed benefits to illegal immigrants. For much the same reasons expressed in the order of the district court, we conclude that whether the level of illegal immigration is an "invasion" of Florida and whether this level violates the guarantee of a republican form of government present nonjusticiable political

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[5]Because of this circumstance, the district court concluded that this claim was nonjusticiable. *Chiles,* 874 F.Supp. at 1342.

questions. *See generally Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). And, we agree that Florida's provision of benefits to illegal aliens is not the product of federal coercion of the kind which violates the Tenth Amendment. *Compare New York v. United States,* 505 U.S. 144, 173-78, 112 S.Ct. 2408, 2427-29, 120 L.Ed.2d 120 (1992) *with Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *and Dep't of Health & Rehabilitative Services v. Solis,* 580 So.2d 146 (Fla.1991).

Conclusion

We recognize that the difficulty in fashioning a remedy for an alleged wrong can result in a case being nonjusticiable. *See Powell v. McCormack,* 395 U.S. 486, 515-17, 89 S.Ct. 1944, 1961, 23 L.Ed.2d 491 (1969). Because we conclude that Florida fails to state a claim upon which relief can be granted by a court, we do not reach this issue. The order of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 94-0676-CIV-DAVIS

LAWTON M. CHILES, JR., et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

_____/

ORDER ON MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

THE IMMIGRATION CRISIS that is currently facing the United States has culminated in the filing of this action. This problem is not new. As the then-President Ronald Reagan proclaimed in 1981:

> The ongoing migration of persons to the United States in violation of our laws is a serious national problem, detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens to the Southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). The costs of this continuing influx of aliens are disproportionately concentrated in only a few states,[1] including Florida.[2]

BACKGROUND AND SUMMARY OF THE COMPLAINT

On April 11, 1994, Lawton M. Chiles, Jr., the State of Florida, the Dade County Public Health Trust, and the School Board of Dade County, Florida ("Plaintiffs") filed suit against the United States of America and several individual officers of the United States. The Plaintiffs' grievances with the United States are based on allegations that the United States has failed to properly enforce immigration policies, thereby causing the State of Florida to incur disproportionate and unfair expenses in educating and providing other public benefits to aliens.[3] Plaintiffs apparently realize the difficulty in having this court

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[1]The seven states with the largest numbers of undocumented aliens are: California, Florida, Texas, New York, Illinois, Arizona, and New Jersey. The Urban Institute, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States*, September, 1994.

[2]In a report funded by the Department of Justice entitled *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States,* the Urban Institute analyzed the impact that undocumented aliens were having on seven states including Florida. The report estimated that Florida's undocumented alien population as of October 1992, was approximately 322,000 or 2.3% of the total population of Florida. The report estimated Florida's annual expenditures for (1) public schools for undocumented aliens in 1993–94 was $424 million ; (2) emergency services under Medicaid for undocumented aliens in 1993 was $22.5 – $29.1 million; and (3) incarcerating illegal aliens in 1994 will be $11.8 million. *Id.* at 5, 8, 11, and 13.

[3]The Plaintiffs complain about the expenses they are forced to incur on behalf of both legal and illegal aliens, arguing that even many legal aliens are not self-sufficient members of the community and that the state is forced to provide for these persons basic education, immunization from contagious diseases, food, housing, public transportation, and health care. *(See, e.g.*, Complaint ¶¶ 47, 51).

mandate that the executive branch of the United States enforce immigration laws; however, they still contend that "a mandatory injunction requiring defendants to make payments under statutes mandating the provision of financial assistance is well within the power of this court . . . ." (Complaint ¶ 14). They urge this Court to grant them relief because they have no other avenue in which to obtain a remedy:

> Plaintiffs have no administrative remedy to pursue, to influence or to change the decisions and policies of defendants, which decisions and policies permit and cause a massive and uncontrolled influx of aliens, including undocumented aliens, to enter and remain in the United States and the State of Florida.

(Complaint ¶ 61). They further argue that the political process cannot provide them with help:

> The national political process has provided no adequate safeguard against this discrimination. The costs imposed by the continuing influx of aliens on state and local governments are disproportionately concentrated in only a few states, including Florida. Representatives of other states have a political incentive to ignore such costs, or to provide only small and thus far ineffective tokens of assistance, rather than ensure that they are borne equitably. Accordingly, unless this Court grants appropriate relief, the State of Florida and the other plaintiffs will continue to incur and have to pay such costs as are described herein in the future.

(Complaint ¶ 64).

The complaint alleges four counts. In Count I, Plaintiffs allege that they are entitled to grants from an Immigration Emergency Fund administered by the Attorney General of the United States, and they ask the Court to direct that Defendants develop a plan to disburse that fund. *See* 8 U.S.C. § 1101 (1993). As relief, Plaintiffs demand that the Attorney General of the United States grant the State of Florida its share of the emergency funds. (Complaint ¶ 72).

In Count II of the complaint, Plaintiffs allege that, under 8 U.S.C. § 1103, Defendants have failed to "enforce and administer the immigration laws or to accept the financial responsibility for such failure." (Complaint ¶ 76). Plaintiffs also frame this cause of action under 5 U.S.C. § 702 and 5 U.S.C. § 706. Plaintiffs allege that they have no choice but to pay the cost of the Defendants' failure to enforce the immigration laws and that failure to absorb the costs would cause Florida to suffer injury through "increased crime, disease, illness, homelessness, and the many problems presented by an uneducated or poorly educated populace." (Complaint ¶ 77). Plaintiffs argue that instead of forcing Defendants to properly enforce the immigration laws, the problem could be "alleviated by an ongoing restitution to Plaintiffs of the prospective costs imposed on them by the Federal Abdication and Default Policy." (Complaint ¶ 81).

Count III challenges the operation of two federal programs, Medicaid and Aid for Families with Dependent Children ("AFDC"). Both programs have provisions limiting the payment of federal funds to certain aliens.[4] Plaintiffs argue that the State of Florida is disproportionately affected by these

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[4]Under AFDC, benefits are provided to citizens or "an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law . . . ." 42 U.S.C. § 602(a)(33).

restrictions because of the large number of aliens that live in Florida, and therefore ask the Court to order Defendants to provide these services. They allege that it "is arbitrary, irrational, and unconstitutional for Defendants not to provide Medicaid and AFDC assistance to Florida on the same basis that other states are assisted. That basis is need." (Complaint ¶ 87). Plaintiffs argue:

> The defendants' failure to compensate the plaintiffs for making need-based payments to aliens, while assisting virtually all other states with virtually all of their expenditures to provide need-based medical care and aid to families with dependent children, effectively penalizes plaintiffs for having a needy population that is disproportionately comprised of aliens, largely as a result of defendants' Federal Abdication and Default Policy.

(Complaint ¶ 89). Plaintiffs also allege that Defendants are in violation of Article IV, § 4 and Article I, § 8 of the Constitution. (Complaint ¶¶ 90, 91).

Count IV of the complaint alleges that the Defendants have imposed the financial burdens of immigration on the State of Florida thereby violating the Guarantee and Invasion Clauses of Article IV of the Constitution and the Tenth Amendment by requiring Florida to provide social welfare services to these immigrants. (Complaint ¶¶ 97, 98). Plaintiffs allege that the failure to properly enforce the immigration laws has resulted in an "invasion" of the State of Florida by aliens and has "seriously impaired the constitutional guarantee of a republican form of government." (Complaint ¶ 97). As in Count II, rather than asking the Court to force the executive to enforce the immigration laws, Plaintiffs ask the Court to grant a mandatory injunction requiring the Defendants to pay

restitution until the immigration laws are enforced properly. (Complaint ¶ 104).[5]

STANDARD OF REVIEW

The Defendants seek dismissal of the entire complaint under Federal Rule of Civil Procedure 12(b)(6). To state a claim, Federal Rule of Civil Procedure 8(a) requires, inter alia, "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court must "take the material allegations of the complaint and its incorporated exhibits as true, and liberally construe the complaint in favor of the Plaintiff." *Burch v. Apalachee Community Mental Health Services, Inc.*, 840 F.2d 797, 798 (11th Cir. 1988) (citation omitted), aff'd, 494 U.S. 113 (1990). The law in this Circuit is well settled that "the 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'." *SEC v. ESM Group, Inc.*, 835 F.2d 270, 272 (llth Cir.) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)), cert. denied, 486 U.S. 1055 (1988). The moving party bears a heavy burden. *St. Joseph's Hospital, Inc. v. Hospital Corp. of America*, 795 F.2d 948, 953 (llth Cir. 1986).

PARTIES ARGUMENTS AND COURT'S DECISION

The Defendants present three general arguments in support of dismissal of all four counts of the complaint in the

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[5]The Plaintiffs argue that counts I and III of the complaint are sustainable under existing law but admit that counts II and IV would require this Court to extend the law as it currently exists.

aggregate. Then, they discuss the complaint count by count, urging that each count in the complaint fails to state a claim in its own right.

A. Count I

Before addressing Defendants' general arguments, the Court will address a new development as it relates to Count I. As stated earlier, in Count I, Plaintiffs allege that they are entitled to grants from an Immigration Emergency Fund administered by the Attorney General of the United States, and they ask the Court to direct that the Defendants develop a plan to disburse that fund. *See* 8 U.S.C. § 1101 (1993).

In 1986, Congress authorized a continuing annual appropriation of $35 million to be used to reimburse states for costs incurred in meeting immigration emergencies. In 1990, Congress adopted an amendment to 8 U.S.C. § 1101 which allowed the Attorney General to disburse up to $20 million of this $35 million annually to states without the President's declaration of an immigration emergency. In 1991, the Attorney General was directed to promulgate regulations governing the process by which states could be reimbursed with the appropriated funds. *See* Pub. L. 102140, Title VI, § 610, 105 Stat. 832.

Although Proposed Immigration Emergency Fund Rules were first published on January 14, 1992, final rules were not adopted until June 14, 1994, subsequent to the filing of this lawsuit. See 59 Fed. Reg. 30520 (June 14, 1994). These Final Rules were not adopted until eight years after the $35 million was allocated to reimburse states, four years after the Attorney General was given permission to disburse the funds,

and three years after the Attorney General was directed to promulgate regulations for the disbursement of these funds.[6]

As these Rules have recently been promulgated, Plaintiffs have not been able to demonstrate that they have sought relief under the Rules.[7] Until such time as Plaintiffs have sought and been denied relief pursuant to these new rules, this Count is not ripe for the Court's review and must be dismissed.

B. The General Arguments

The Defendants' three general arguments are as follows: (1) that the entire complaint presents a political question or dispute that is not justiciable; (2) that the Plaintiffs have no standing to bring suit because they have not alleged and cannot allege that the Defendants are the direct cause of their injuries; and (3) that all counts in the complaint except Count I must be dismissed because the Defendants are immune from suit and have not waived their sovereign immunity.

Political Question

Defendants' first argument is that the entire complaint presents a political question or dispute that is not justiciable. They argue that the complaint goes to (1) Congress's choices in allocating resources, and (2) the Executive's enforcement of the laws, neither of which are justiciable.

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[6]An old Florida Cracker saying, "the old he-coon walks just before the light of day," has received a substantial amount of publicity lately in the State of Florida. It is possible that the current Attorney General, a lifelong Florida resident, understands Cracker and realized that the sun was about to rise and, therefore, issued the final Immigration Emergency Fund Rules.

[7]The Court expects that the Attorney General will make an expedient determination as to whether an immigration emergency exists and, if so, will diligently disburse any available funds to those states disproportionately affected by the continuing influx of aliens.

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166 (1986). The Judiciary is not suited to make such decisions because courts are ill equipped to set national policies or define standards for matters that are not legal in nature. *Id.* (citation omitted). To determine "whether a question falls within the political question category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."[8] *Baker v. Carr,* 369 U.S. 186, 209, 82 S.Ct. 691, 706, __ L.Ed __ (1962) (quotation omitted).

Defendants argue that this controversy is a policy dispute between the State of Florida and the Federal Government over the proper allocation of federal resources and the execution of discretionary policies. Thus, the case presents a non-justiciable political question inappropriate for judicial

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[8]As the Supreme Court stated in *Baker v. Carr:*

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217, 82 S.Ct. at 710.

resolution because it requires the Court to adjudicate in areas of foreign policy, national defense, immigration and the allocation of federal resources. Additionally, Defendants assert that the Court is unable to compensate the State of Florida because of [*sic*] the Court lacks a definable standard for evaluation of Plaintiffs' claims that the federal enforcement of immigration laws is inadequate and, therefore, should be left to the other branches of the Federal Government to resolve.

It is undisputed that the Federal Government's control over immigration is plenary. "The authority to control immigration — to admit or exclude aliens — is vested solely in the Federal Government." *Truax v. Raich,* 239 U.S. 33, 42, 36 S.Ct. 7, 11 (1915) (citation omitted). The Supreme Court, in *Faillo v. Bell,* 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977), stated that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Id.* at 792, 97 S.Ct. at 1478, citing *Oceanic Navigation Co. v. Stranahan,* 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909). But in *Baker v. Carr,* the Supreme Court carefully pointed out that not every matter touching on politics falls under the political question doctrine. 369 at 211, 82 S.Ct. at 707 (1969). Specifically, it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.*

The Court shall address the political question doctrine in terms of each count of the Complaint.

a. Count II

Count II is based on the failure of the Federal Government to enforce and effectively administer immigration laws. In essence, Plaintiffs are seeking an order of the Court requiring the United States to cease its policy of "arbitrary and irrational nonenforcement" of the immigration laws or to

provide equitable restitution in the alternative. Plaintiffs claim that the Attorney General is abusing her discretion in failing to enforce immigration laws. Plaintiffs admit that ordering a broad-scale injunction against the United States to enforce the immigration laws may well be beyond the competence of the Court as it would involve the Court in matters relating to the conduct of foreign relations and the deployment of the military forces of the United States. (Complaint, ¶14). The Court agrees and will therefore restrict its discussion to Plaintiffs' alternative ground for relief, equitable restitution.

Plaintiffs allege that in Count II they are only asking that the Court exercise its inherent authority of statutory interpretation to determine whether the United States is fulfilling its statutory duty to the State of Florida. Plaintiffs allege that the Attorney General has an obligation to deport illegal aliens under 8 U.S.C. § 1103. This section, which pertains to the powers and duties of the Attorney General, states in part:

> **(a) Attorney General**
>
> . . . He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. . . .

8 U.S.C. § 1103 (1993). Plaintiffs claim that the Attorney General has in essence abdicated this responsibility.

Plaintiffs assert that the present case is analogous to *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), in that both cases

require the court to interpret a statute that has political overtones. In *Japan Whaling*, the petitioners sought an injunction requiring the Secretary of Commerce to certify to the President that Japan, in its whale harvesting, was diminishing the effectiveness of the International Whaling Commission quotas. Title 22, section 1978 of the United States Code specifically states that "[w]hen the Secretary of Commerce determines that nationals of a foreign country . . . are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President." 22 U.S.C. § 1978. The Supreme Court concluded that it was within the [*sic*] its authority to determine whether 22 U.S.C. § 1978 imposed a duty upon the Secretary, as this was simply a matter of statutory interpretation. The Supreme Court recognized that *Baker* authorizes courts to interpret congressional legislation. *Id.*, 106 S.Ct. at 2866.

In the present case, Plaintiffs are asking the Court to review the overall immigration policy of the United States and decide if the Attorney General's failure to deport illegal aliens is a violation of 8 U.S.C. § 1103. Plaintiffs argue that section 1103 imposes on the Attorney General an affirmative duty to deport all illegal aliens. The Court does not find 8 U.S.C. § 1103 to be analogous to the statute referred to in *Japan Whaling* that imposes a specific duty, in that section 1103 allows for the Attorney General's discretion in determining whether to deport an illegal alien. Rather, in reviewing 8 U.S.C. § 1103, the Court finds it to be analogous to the duty imposed on each United States attorney under 28 U.S.C. § 547. Section 547 states in part:

> Except as otherwise provided by law, each United States attorney, within his district, shall —

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(1) prosecute for all offenses against the United States;
. . .

28 U.S.C. § 547 (1993). Although § 547 appears to require each United States attorney to prosecute all offenses against the United States, no such duty exists. It is well established that the Executive Branch, and therefore the United States Attorney, has exclusive authority and absolute discretion to decide whether to prosecute a case. *United States v. Nixon,* 418 U.S. 696, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974). *See also Confiscation Cases,* 7 Wall. 454, 19 L.Ed. 196 (1869). This recognition of prosecutorial discretion is attributable in no small part to the general unsuitability for judicial review of the attorney's decision to refuse to prosecute. *See Heckler v. Chaney,* 470 U.S. 821, 831, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

Like 28 U.S.C. § 547, the Court concludes that the Attorney General's decisions under 8 U.S.C. § 1103 not to deport are unsuitable for review. A decision of this sort requires a complicated balancing of factors which are peculiarly within the Attorney General's expertise. The Attorney General must consider many factors including whether deportation best fits the agency and the Federal Government's overall policies, and whether the political climate of an alien's native country makes deportation unsuitable. Thus, the Court finds the Attorney General's decision not to deport presumptively immune from judicial review. *See Heckler,* 470 U.S. at 831–32, 105 S.Ct. at 1655–56.

In *Heckler v. Chaney,* 470 U.S. 835, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), the Supreme Court defined circumstances in which judicial review of agency inactions is appropriate. *Heckler* dealt with the Federal Drug Administration's refusal to take enforcement action concerning the use of certain drugs. The Supreme Court concluded that under 5 U.S.C. § 701(a)(2)

there is a presumption of unreviewability of an agency's decision not to undertake enforcement action. This presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. *Id.* 470 U.S. at 832–33, 105 S.Ct. 1656. In a footnote to its opinion, the Supreme Court stated that it expressed no opinion on whether, where an agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities, such decisions are unreviewable under § 701(a)(2). The Court stated that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion." *Id.* fn. 4.

In the instant case, Florida alleges that the Attorney General's inaction has resulted in an abdication of her statutory responsibility. As stated in *Heckler*, under 8 U.S.C. § 701(a)(2) there is a presumption of unreviewability of the Attorney General's decision not to undertake enforcement action. Florida has failed to identify any guidelines contained in the statutes that would rebut this presumption.

As for Florida's allegation that there has been an abdication of the Attorney General's responsibility, the Court can identify nothing in 8 U.S.C. § 1103, which confers the power to enforce the immigration laws, that would indicate that the Attorney General's decision not to undertake enforcement action in certain situations is not "committed to agency discretion." *Id.* fn. 4. Therefore, the Court must dismiss Count II.

b. Count III

In Count III, Plaintiffs seek either declaratory relief or damages. Plaintiffs request that the Court declare the current

restrictions against providing Medicaid and AFDC benefits to illegal aliens either contrary to applicable statutes or unconstitutional for failing to provide payments to Florida for expenses on behalf of aliens.[9]

Plaintiffs base this claim on the Tenth Amendment[10] and the Guarantee Clause[11] of the United States Constitution

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[9]Medicaid is authorized under 42 U.S.C. § 1396b and implemented under 42 C.F.R. §§ 435.406 and 435.408. AFDC is authorized under 42 U.S.C. § 202 and implemented pursuant to 45 C.F.R. §§ 233.50, 233.51 and 233.52.

The foregoing provisions prohibit reimbursing states for any expenses incurred on behalf of an alien not having a specified "lawful status." Medicaid reimbursement for illegal aliens is limited to "emergency medical conditions," as defined in 42 U.S.C. § 1396b(v)(3). Similarly, states may not be reimbursed for providing AFDC coverage to an alien, no matter how impoverished, unless the alien has a recognized lawful status. See 42 U.S.C. § 602 (a) (33). Hence, the welfare needs of the hundreds of thousands present in Florida who have no lawful status must be met with other funds by state and local governments.

[10]The Tenth Amendment to the Constitution of the United States of America states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S.Const. amend. X.

[11]The Guarantee Clause, Article IV, Section 4 of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the

alleging that the Federal Government's policies disproportionately affect Florida, thus rendering the State of Florida politically isolated and powerless. Plaintiffs seek a declaration that the restrictions are unconstitutional or, in the alternative, ask the Court to require that the Federal Government pay for expenses incurred for Medicaid and AFDC to illegal aliens.

The Federal Government's decision not to provide Medicaid or AFDC to illegal aliens is based on the Federal Government's powers over naturalization and immigration, and spending.[12] The Supreme Court stated in *Mathews v. Diaz:*

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances,

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> Legislature cannot be convened) against domestic violence.

U.S. Const. art. IV, § 4.

[12]Article I, Section 8 of the United States Constitution sets out the Federal Government's spending powers; this provision states:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U.S. Const., art. I, § 8.

> such decisions are frequently of a character more appropriate to either the Legislature or the Executive than the Judiciary. . . . Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with greatest caution.

Mathews v. Diaz, 426 U.S. 67, 81–82, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976) (footnotes omitted).

The Federal Government has determined that it would not be in the United States' best interest to provide Medicaid and AFDC to illegal aliens.[13] It is not difficult to comprehend the rationale behind this decision; to provide these benefits would create additional incentives for illegal immigration into the United States. This could have a serious and substantial impact on this country's immigration and naturalization scheme as well as on the nation's relationships with foreign countries. If the Court were to order the Federal Government to reimburse the states for the Medicaid and AFDC costs, the Court would be intruding into the realm of foreign policy, an arena in which the Judiciary does not belong.

In addition, it is well settled that the power of the Federal Government to spend is limited only by the requirement that such power shall be exercised to provide for the general welfare of the United States. *United States v. Butler*, 297 U.S. 1, 65–6, 56 S.Ct. 312, 319, 80 L.Ed.2d 477 (1936). Once the Federal Government determines that it is in

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[13]This case demonstrates that what may be in the best interests of the United States, can be devastating to individual states, in this case, the State of Florida.

the best interest of the United States not provide these benefits to illegal aliens, the Court's inquiry must end.[14]

The State of Florida chose to participate in both Medicaid and AFDC. *See* 42 U.S.C. §§ 601, 1396 (1991). As a condition of participation, the State of Florida must abide by the conditions of the programs, including the lack of funding for illegal aliens.[15]

The Court finds that there is a textually demonstrable constitutional commitment of the issue of whether to provide Medicaid and AFDC benefits to illegal aliens to the Legislative and Executive branches of the Federal Government. Thus, this issue presents a political question, and, therefore, must be dismissed.

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[14]In their response to the motion to dismiss, Plaintiffs assert that Congress is not spending for the general welfare when it funds these programs for some but not all of the states on the basis of need." (D.E. 53, p. 47.) As already stated, decreasing the incentive for the continued flow of illegal aliens into the United States is within the "general welfare" of the United States.

[15]Plaintiffs make an additional argument that as a result of the Federal Government's policy not to provide Medicaid and AFDC benefits to illegal aliens, the State of Florida is bearing an unfair burden. Plaintiffs allege that although the statute is neutral on its face, there is an uneven impact in Florida due to the disproportionate presence of illegal aliens in Florida.

Plaintiffs assert that within the Tenth Amendment and Guarantee Clause is a requirement that all states be treated equally. (D.E. 53, p. 47.) It is clear from the facts that the Federal Government refuses to provide Medicaid and AFDC to all illegal aliens no matter what state the illegal aliens are from. The fact that the results of the policy have a greater affect on the State of Florida, than on other states, does not create an actionable claim.

To illustrate this point, if tomorrow the Federal Government decided to discontinue all wheat subsidies to all farmers in the United States, the impact of this change in policy would obviously have its greatest impact on the Midwestern states. Although the Midwestern states would be called upon to bear a much greater burden, this does not make the policy of no wheat subsidies unconstitutional.

c. Count IV

Count IV is for declaratory and injunctive relief for violation of Plaintiffs' rights under Article IV, Section 4 of the United States Constitution and the Tenth Amendment. Plaintiffs assert that the Federal Government's failure to protect the State of Florida against invasion of illegal aliens "has brought coercive pressure to bear on the state and local political processes to provide education, welfare and medical care to these aliens,"[16] and "blurred lines of political accountability" in violation of the Tenth Amendment and the Guarantee Clause of the Constitution.[17] (D.E. 53, p. 10). In essence, Plaintiffs claim that the Federal Government's failure to control the influx of illegal aliens into the State of Florida prevents the government of Florida from functioning in a democratic way.[18] Thus, Plaintiffs ask the Court to order that Defendants terminate the policies that have subjected Florida to an invasion of aliens or requests equitable restitution.

Defendants argue that this count is barred by the political question doctrine as there exists no judicially

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[16]Due to the continuing influx of aliens, heavy burdens are placed on Florida's available resources. Among the continuing costs are those of public infrastructure improvements, housing, feeding, medical care, education, incarceration, and parole and probation supervision.

[17]Under the Tenth Amendment, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. U.S.*,_ U.S._, 112 S.Ct. 2408, 2417, __L.Ed.2d__ (1992).

[18]Plaintiffs assert that "Florida's lack of any means to protect itself against the ever increasing demands together with defendants' denial of financial assistance has extinguished the lines of political accountability. . . ." (D.E. 53, p. 42). Plaintiffs claim that Federal officials remain insulated from the consequences of their policies, while Florida elected officials are forced to shape their agendas based on federal priorities and not those of their constituents. (D.E. 53, p. 43.)

manageable standard "for which the Court can determine at what point the migration becomes an invasion or when the social costs of migration somehow invade [the State of Florida's] sovereignty." (D. E. 73, p 9). Defendants argue that without such a standard, Count IV presents a political question for which the Court lacks jurisdiction. *See Nixon v. U.S.*, __U.S__, 113 S.Ct. 732, 735, __ L. Ed. 2d__ (1993) ("the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch").

The Supreme Court has repeatedly stated that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . ." *Matthew v. Diaz*, 426 U.S. 67, 83, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976); *Baker*, 369 U.S. at 217, 82 S.Ct. at 710.

Plaintiffs claim that the Supreme Court, in *New York v. U.S.*, sets out a judicially manageable standard that should be applied to this cause of action. Plaintiffs claim that the "government breaches its duty when its failure to protect against invasion of illegal aliens imposes coercive pressure on the state and local political processes, and blurs lines of political accountability to such a degree as to infringe on the sovereignty interests protected by the Tenth Amendment under such cases as *New York v. United States*." (D.E. 53). The Court does not find this to be a manageable standard when applied to the instant case.

In *New York*, the Supreme Court was faced with determining whether federal legislation which required states to adopt regulations for the disposal of radioactive wastes, 42 U.S.C. § 2021(d)(2)(C), took away political accountability to such an extent as to infringe on the sovereign powers of the states. The Supreme Court concluded that the Federal

Government's mandate that states adopt legislation diminished the accountability of the state government to its electorate and therefore violated the Tenth Amendment.

Justice O'Connor, writing for a six Justice majority, drew a careful distinction between Congress' "substantial powers to govern the Nation directly, including in areas of intimate concern to the States," and the prohibited "ability to require the States to govern according to Congress' instructions." *New York*, 112 S.Ct. at 2421. Justice O'Connor emphasized that "even when Congress has the authority to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 2423. The Supreme Court concluded that even though Congress has the power to regulate the disposal of radioactive waste, Congress does not have the power to order the states to adopt legislation to regulate in this area. *Id.* at 2429. Thus, the Supreme Court declared 42 U.S.C. § 2021(d)(2)(C) unconstitutional.

The distinction between *New York* and the present case is that, in *New York*, Congress ordered the states to adopt specific policies. In the instant case, Congress has adopted the policies themselves and did not order any action on the part of the states. Congress did not command that the State of Florida do anything. In fact, there is no specific legislation at issue. That Florida has chosen to provide certain services to aliens is not a result of an order from Congress, but a conscious policy choice on behalf of the State of Florida.[19] As the instant case does not involve a situation where Congress has ordered

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[19]The Court acknowledges Plaintiffs' argument that any choice Florida has is, in essence, a Hobson's choice. The State of Florida is presented with the following dilemma: If Florida chooses not to provide services to illegal aliens including closing schools, emergency rooms, etc., the impact on the health, safety and welfare of its citizenry could be potentially devastating. If, on the other hand, Florida chooses to provide the services, the cost of these services could cripple the State of Florida.

legislative action on the part of the states, the standard set out in *New York* is not appropriate.

The Plaintiffs fail to suggest, and the Court is unable to identify, a manageable standard for determining when the migration, as well as the costs associated with such migration, reaches the point at which it invades the State of Florida's state sovereignty. In order to grant the restitution requested by Plaintiffs, the Court would be forced to review the United States entire enforcement of Federal immigration laws including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those additional resources should be allocated. The Court is unable to identify satisfactory criteria for making these determinations.[20] This is clearly beyond the

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[20]Plaintiffs rely on *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), for support for their contention that the Federal Government should bear the costs associated with illegal aliens. In *Plyler*, the Supreme Court was faced with the issue of whether the individual states could deny elementary education to children who were illegal aliens. The Supreme Court concluded that, under the Fourteenth Amendment, states could not refuse elementary education to illegal alien children.

In a dissenting opinion, joined by Justices White, Rehnquist and O'Connor, Justice Burger recognized the financial burden that this decision would place on the states. Justice Burger stated that:

> It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly charged with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here.

Id. at 242, 106 S.Ct. at 2408, n. 1 (Burger, J., dissenting). Although this Court agrees with the rationale employed by Justice Burger in his dissenting opinion, to date, neither this Court nor the Supreme Court has been able to identify a judicially manageable standard under which a court could order the Federal Government to bear the costs associated with the mass influx of illegal aliens.

Judiciary's authority, and should be left to the Legislative and Executive branches of government.

The Court recognizes that the State of Florida is suffering under a tremendous financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws. The State of Florida is in desperate need of relief from this overwhelming burden it is being unfairly forced to bear. The Court also recognizes that, as the State of Florida has already sought relief through the political process, the State may have no other method for obtaining relief from this burden should this Court determine that the issue is a political question. But recognizing these facts does not create a legal theory under which this Court may grant relief. Without such a legal theory, this Court must dismiss this action.[21]

Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is GRANTED. It is

FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion for Mandatory Injunction as to Count I and for Partial Summary Judgment Requiring Such Mandatory Injunction is DENIED as MOOT.

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[21]As the Court has determined that this action is barred by the political question doctrine, the Court need not address Defendants' additional arguments.

This case is DISMISSED. All pending motions not otherwise ruled upon are DENIED as MOOT.

DONE AND ORDERED in Chambers, at Miami, Florida, this _____ day of December, 1994.

/s/

EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article IV, §4, United States Constitution:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

2. Tenth Amendment, United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. 8 U.S.C. §1103(a)

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the

Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detain employees of the Service for duty in foreign countries.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 94-0676-CIV-DAVIS

LAWTON M. CHILES, JR., et al.

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.

Defendants.
_____/

COMPLAINT

Plaintiffs, Lawton M. Chiles, Jr., Governor of the State of Florida; the State of Florida; Dade County Public Health Trust; and the School Board of Dade County, sue defendants United States of America; Doris Meissner, Commissioner of the Immigration and Naturalization Service ("INS"); Janet Reno, Attorney General of the United States; Jennifer Nelson, Acting Regional Administrator of the Southern Regional Office of the INS; Walter D. Cadman, District Director of the Miami District Office of the INS; and Donna E. Shalala, the Secretary of the United States Department of Health & Human Services (the defendants are referred to collectively as the "Federal Government"), and allege:

I.
JURISDICTION

1. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 702, *et seq.*, 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201 and 2202.

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), specifically in that a substantial portion of the events or omissions giving rise to the claims alleged arose within the jurisdiction of the United States District Court for the Southern District of Florida.

3. Immigration into the United States is controlled by the Attorney General, through the INS. *See*, 8 U.S.C. § 1101, *et seq.* and 28 C.F.R. § 0.105, *et seq.*

II.
INTRODUCTION

4. This case involves the unprecedented and grossly disparate economic burden forced upon the State of Florida by the Federal Government's continuing failure to enforce or rationally administer its own immigration laws since well before 1980. This burden is particularly egregious with respect to persons who have been permitted by the Federal Government to enter and/or remain in Florida without complying with those laws.

5. The Federal Government has exclusive and plenary control of the immigration laws and their enforcement. Article I, § 8 of the United States Constitution gives the Federal Government authority to provide for the defense of the nation, to regulate foreign commerce and to create a uniform law of naturalization. The individual States are thus prohibited from adopting immigration laws. *See, Henderson v. Mayor of*

City of New York, 92 U.S. 259, 23 L.Ed. 543 (1876) (holding state immigration laws to be an unconstitutional violation of the federal power to regulate foreign commerce).

6. Yet, since well before 1980, the Federal Government, through the action and inaction of the individual defendants (and their predecessors in office), has abdicated its responsibility under the immigration laws and the United States Constitution to enforce and administer rational immigration policies.

7. The result of the Federal Government's failure to control immigration and protect the national borders has resulted in a massive and uncontrolled influx of aliens who enter the United States and the State of Florida in violation of the immigration laws. As then-President Ronald Reagan proclaimed in 1981, "The ongoing migration of persons to the United States in violation of our laws is a serious national problem, detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens to the Southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region." "High Seas Interdiction of Illegal Aliens," by Ronald Reagan, President of the United States of America, Proclamation 4865 of September 29, 1981, 46 F.R. 48107. A grossly disproportionate share of this alien population arrives at Florida's shores, and continues to reside here. Florida is without legal or actual power to stop this massive and uncontrolled influx. The term "alien" or "alien person," as used in this complaint, means those persons defined as "aliens" in 8 U.S.C. § 1101(a)(3). The term "undocumented alien," as used in this complaint, means those foreign nationals who: (a) entered the United States without inspection; (b) entered with

fraudulent documentation; (c) after entering legally with a temporary visa, remained in the United States after the visa expired; or (d) who are excludable pursuant to 8 U.S.C. § 1182.

8. While the Federal Government is exclusively and directly responsible for the uncontrolled influx of aliens to Florida, the Federal Government has failed to provide for the needs of such aliens once they arrive. As one commentator has noted:

> [W]hile the federal government has concentrated on U.S. immigration policy, it has ignored immigrants' needs when they arrive. The federal government has no comprehensive immigrant policy on language, orientation or education to help newcomers adjust to a new society. The federal government provides limited benefits to a narrow and shrinking proportion of the newcomer population, namely refugees and legalized aliens.
>
> Unlike the federal government, states and localities do not have the luxury of ignoring the needs of newcomers. The public health and welfare of many state and local communities depends upon successful newcomer transitions. *By federal default, states [sic] and local governments have become the stewards of immigrant policy.*

Dunlap, "The Absent Federal Partner," 67 Spectrum: The Journal of State Government, 6, 7 (Winter 1994) (emphasis added).

9. Plaintiffs are well aware of the positive impact immigrants have had and will continue to have on Florida. They bring a cultural diversity and richness to the State.

However, the cost to the State of the uncontrolled influx of aliens, particularly undocumented ones, has been overwhelming. The need of these persons for services is substantial, and Florida *must* provide these services to maintain the health, safety, and welfare of the community.

10. The Federal Government has failed to provide reimbursement for many of the services Florida is required by law to afford aliens once they arrive upon the shores of Florida, as well as other necessary services which must be afforded them to serve the public health and safety of the State. Thus, while Florida has borne the dislocations brought on by an exploding alien population (accounting for 95% of the population growth in Dade County alone over the past ten years), the Federal Government has not accepted the responsibility to pay for many of the costs of this alien population, but rather has compelled Florida to absorb them.

11. While acknowledging that the uncontrolled influx of aliens to the State of Florida has had severe financial consequences, the Federal Government has failed to take appropriate action to either control the influx or to pay for the resulting costs. As a result of the Federal Government's failure to cover the costs resulting from its unwillingness to control immigration, the State of Florida is the victim of an ongoing immigration emergency that severely endangers the lives, property, safety, and economic welfare of the residents of the State. It has been estimated that the cost to Floridians of providing services to aliens amounted to $2.5 billion in fiscal year 1993 from State and local sources combined. At the State level alone, costs for providing services to aliens are estimated at $751 million per year. Total estimated costs for undocumented aliens are approximately $884 million per year, representing nearly 35% of the total cost of providing services to aliens in fiscal year 1993. These absorbed costs are detailed in "The Unfair Burden: Immigration's Impact on Florida,"

prepared by the Executive Office of the Governor, Office of Planning and Budgeting, Intergovernmental Affairs Policy Unit and Florida Advisory Council on Intergovernmental Relations, pp. i, iii (March 1994) (attached as Exhibit A hereto).

12. It is arbitrary, capricious, and an abuse of discretion for defendants to refuse to protect the integrity of Florida's borders and to also refuse to pay the costs which have resulted from that refusal. In effect, defendants have punished Florida for the very conditions in which defendants have placed Florida. This is repugnant to constitutional norms of equality and fairness.

13. It is repugnant to constitutional norms of equality and fairness that the Federal Government has opened the door to an uncontrolled influx of aliens, has received and continues to receive most of the taxes paid by such aliens once they are here, but has shifted most of the costs of such aliens to a handful of state and local governments. In fact, according to 1993 testimony by Charles Wheeler of the National Immigration Law Center before the U.S. House Subcommittee on Human Resources, approximately two-thirds of the tax dollars paid by aliens go to the Federal Government, while most of the health, education and social service costs that are incurred are paid for by the state and local governments in which such aliens reside. *See*, Sharry, "Myths, Realities and Solutions," 67 Spectrum: The Journal of State Government, 20, 21 (Winter 1994).

14. On information and belief, there are many things the Federal Government could do to increase the effective enforcement of the immigration laws. Requiring the Federal Government to take these actions may well be within the purview of this Court. Nevertheless, enjoining defendants to fully enforce the immigration laws (or mandating rational administration) may well be beyond the practical competence

of this Court, since it could involve the Court in matters relating to the conduct of foreign relations and the deployment of the military forces of the United States. In any case, a mandatory injunction requiring defendants to make payments under statutes mandating the provision of financial assistance is well within the power of this Court under *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). Equally within the Court's authority is the power to issue an injunction directing the defendants to fulfill constitutional obligations that can be met through the provision of financial assistance as an alternative to effective enforcement of the immigration laws.

15. Counts I and III of this Complaint are warranted by existing law. Counts II and IV are warranted by a rational and logical argument for extension of the law established by the United States Supreme Court in *Bowen v. Massachusetts, supra*, and *New York v. United States*, __ U.S. __, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Reliance is also placed on both the majority and dissenting opinions in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Plyler forbids the states from withholding public education from illegal alien children and thus obliges them to bear the cost of the federal government's failure to enforce the immigration laws effectively. Five Justices specifically have acknowledged the federal government's responsibility to bear such costs. Thus, Chief Justice Burger's *Plyler v. Doe* dissent, in which he was joined by three other Justices, stated:

> It does not follow...that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens... If the Federal Government,

> properly chargeable with deporting illegal aliens, fails to do so, it should bear the burden of their presence here.

457 U.S. at 242, n. 1. In addition, Justice Powell, who concurred in the majority opinion, also stated that the Federal Government should bear financial responsibility for its actions. 457 U.S. at 241. This action is brought to impose that burden on the Federal Government.

III.
STANDING

16. Plaintiffs have all suffered serious economic detriment by reason of the actions of defendants herein complained of, which, as the Court of Appeals for the 11th Circuit stated in *Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989), is "the epitome of an injury in fact." This injury has been to their respective "sovereign interest[s], that is [their respective] abilit[ies] to exercise [their] power." *Id.* at 1208. This injury will be "redressed by a favorable judicial decision" granting the relief herein sought. *Id.* at 1209.

IV.
PARTIES

17. Plaintiff Lawton M. Chiles, Jr. ("Chiles"), is a citizen, resident, and taxpayer of the United States and Florida. Chiles is the Governor of the State of Florida and, pursuant to Article IV of the Florida Constitution, exercises the supreme executive power of the State of Florida. The Governor is also responsible for initial preparation of the State budget which must be balanced. *See* Article VII, § 1(d), Fla. Const.; and Fla. Stat. § 216.162 (1993). As such, the Governor must take responsibility for recommending to the Florida legislature that there either be cuts in other important state spending or

increases in Florida taxes to cover the costs of providing essential services to many aliens. The costs of dealing with the immigration emergency in which Florida finds itself are imposed and compelled by the Federal Government. Chiles brings this action in his individual and official capacities.

18. Plaintiff State of Florida is a sovereign state of the United States.

19. Plaintiff School Board of Dade County, Florida (the "Dade County School Board"), is a governmental unit established pursuant to Article 9, § 4, of the Florida Constitution, to operate, control, and supervise all free public schools in Dade County, Florida.

20. Plaintiff Dade County Public Health Trust is a county public health trust established pursuant to Chapter 154, Part II, Florida Statutes. The Dade County Public Health Trust has the power to sue and be sued. Plaintiff Dade County Public Health Trust is an agency and instrumentality of Dade County that governs, operates, and manages Jackson Memorial Hospital and other satellite health care facilities pursuant to Florida Statute § 154.07 (1993).

21. Defendant United States of America is a sovereign nation with the powers and duties specified in the Constitution of the United States and the Acts of Congress.

22. Defendant Doris Meissner is the Commissioner of the Immigration and Naturalization Service ("INS") of the United States Department of Justice ("DOJ"), and is sued in her official capacity (the "INS Commissioner"). The acts complained of herein are those of the present INS Commissioner and several of her predecessors.

23. Defendant Janet Reno is the Attorney General of the United States ("Attorney General"), and she is sued in her official capacity. The Attorney General is the head of the United States Department of Justice, an executive department of the United States, pursuant to 28 U.S.C. § 503. The acts complained of herein are those of the present Attorney General and several of her predecessors.

24. Defendant Jennifer Nelson is the Acting Regional Administrator of the INS Southern Regional Office located in Dallas, Texas ("INS Acting Regional Administrator"), and she is sued in her official capacity. The acts complained of herein are those of the present INS Acting Regional Administrator and several of her predecessors as Regional Administrator, acting and permanent.

25. Defendant Walter D. Cadman is the District Director of the INS District Office in Miami, Florida ("INS District Director"), and he is sued in his official capacity. The acts complained of herein are those of the present INS District Director and several of his predecessors.

26. Defendant Donna E. Shalala is the Secretary of the United States Department of Health and Human Services ("HHS Secretary"), and she is sued in her official capacity. The acts complained of herein are those of the present HHS Secretary and several of her predecessors.

V.
APPLICABLE CONSTITUTIONAL PROVISIONS

27. Article I, § 8, clause 1, United States Constitution, provides, in pertinent part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . ."

28. Article IV, § 4, United States Constitution, provides, in pertinent part: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; . . ."

29. The Tenth Amendment of the United States Constitution provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

VI.
THE CONSTITUTIONAL AND STATUTORY SCHEME: DEFENDANTS' OFFICIAL DUTIES

30. The Attorney General is, pursuant to 8 U.S.C. § 1103, charged with the administration and enforcement of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, as amended (the "INA"), and all other laws relating to the immigration and naturalization of aliens, except insofar as the INA or such laws relate to the powers of the President, the Secretary of State, the officers of the Department of State, or diplomatic and consular officers. The Attorney General serves at the pleasure of the President of the United States.

31. Pursuant to 28 U.S.C. § 510, the Attorney General may from time to time make such provisions as she considers appropriate authorizing the performance by any other officer, employee, or agency of the DOJ of any function of the Attorney General. Defendants INS Commissioner, INS Acting Regional Administrator and INS District Director are all officers and employees of DOJ under the control of the Attorney General.

32. Pursuant to 8 U.S.C. § 1103(a), the Attorney General is authorized to appoint such employees of the INS as

she deems necessary, and to delegate to them or to any officer or employee of DOJ in her discretion any of the duties and powers imposed upon her by the INA. The Attorney General may require or authorize any employee of the INS or DOJ to perform or execute any of the powers, privileges, or duties conferred or imposed by the INA or regulations thereunder upon any other employee of the INS. She has the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and is required to appoint for that purpose such number of employees of the INS as to her shall appear necessary and proper. The Attorney General is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by the INA or regulations thereunder upon officers and employees of the INS.

33. Pursuant to 8 U.S.C. § 1103(b), the INS Commissioner is charged with any and all responsibilities and authority in the administration of the INS and of the INA which are delegated to her by the Attorney General or which may be prescribed by the Attorney General.

34. The Attorney General has, with limitations and exceptions believed to be irrelevant here, delegated to the INS Commissioner the duties to administer and enforce the INA and all other laws relating to immigration, naturalization, and nationality. This delegation is found in 28 C.F.R. §§ 0.105(a) *et seq.* and 8 C.F.R. § 2.1 and 100.2(a). In addition, pursuant to 28 C.F.R. § 0.105(b) and 8 C.F.R. § 2.1, the INS Commissioner shall, for these purposes, exercise or perform any of the authority, functions, or duties conferred upon the Attorney General by the INS and all other laws relating to immigration, including the authority to issue regulations.

35. Defendant INS Acting Regional Administrator is responsible for the administration and enforcement of all laws relating to immigration, nationality, and naturalization within her assigned geographic area of activity pursuant to 8 C.F.R. § 100.2(d), and has jurisdiction over, and provides general guidance and supervision to, inter alia, INS District 6, the INS District Office headquartered in Miami, Florida (the "INS Miami District Office"), pursuant to 8 C.F.R. § 100.4(b)(6). The INS Acting Regional Administrator is subject to the general supervision of the INS Commissioner.

36. Defendant INS District Director is responsible for the administration and enforcement of the INA and all other laws relating to immigration, nationality, and naturalization within his assigned geographic area unless any such power is required to be exercised by higher authority or has been exclusively delegated to another immigration official or class of immigration officer. The INS Miami District Office has jurisdiction over, *inter alia*, the State of Florida pursuant to 8 C.F.R. § 100.4(b)(6).

37. Defendant HHS Secretary is responsible for the administration of the federal Medicaid and Aid to Families with Dependent Children programs pursuant to 42 U.S.C. §§ 602 and 1396b.

VII.
FACTS
THE FEDERAL GOVERNMENT'S ABDICATION AND DEFAULT POLICY

38. The Federal Government is charged with controlling immigration to this country and protecting the borders of the United States, including the borders of the State of Florida.

39. The Federal Government has failed and continues to fail and, upon information and belief, will continue to fail in its constitutional duty to control immigration and to protect the borders of the State of Florida. It has, likewise, defaulted in its alternative duty to adequately reimburse the plaintiffs for the costs its policies have imposed upon them.

40. Upon information and belief, the Federal Government has adopted and implemented what is at best a grossly inadequate enforcement policy that not only fails to prevent, but actually encourages, the continued uncontrolled influx of aliens, including undocumented aliens, to the State of Florida. Furthermore, the INS has not deported any significant number of those aliens who either are immediately or who later become subject to deportation under the immigration laws. Collectively, the Federal Government's actions constitute the adoption and implementation of a policy that not only flouts the laws designed to protect the borders of the United States but the very structural concepts of the Constitution, a policy of abdication and default. It will be referred to herein as the "Federal Abdication and Default Policy."

41. As a direct consequence of the Federal Abdication and Default Policy, large numbers of aliens continue to enter and remain in the United States on an uncontrolled basis. In fact, the then-Attorney General testified on July 30, 1981, to a joint subcommittee of Congress: "We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." Administration's Proposals on Immigration and Refugee Policy, 1981: Joint Hearing before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary and Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess., at 6 (1981) (statement of William French Smith, Attorney General of the United States). The

circumstances had become so outrageous that, in litigation then ongoing in this Court, the United States and the INS asserted, without hyperbole, that the influx of aliens was so massive as to constitute an "invasion" of the United States, and, in so doing, noted that the United States had an unfulfilled constitutional duty to prevent this "invasion." *See Louis v. Nelson*, 544 F. Supp. 973, 975 (S.D. Fla 1982). These conditions have not changed through a series of successive Attorney Generals and INS officials, up to and including the individual defendants here.

FLORIDA'S IMMIGRATION EMERGENCY

42. A grossly disproportionate number of these aliens, including undocumented aliens, reside in or have resided in the State of Florida. INS estimated that as of October 1992, 85% of all undocumented aliens lived in just six States (Florida, California, New York, Texas, Illinois and New Jersey). INS also estimated that at least 345,000 undocumented aliens reside in the State of Florida, comprising at least 36% of Florida's alien population. Based upon the information available to the State, the State believes and alleges the actual number of all such aliens in the State to be much greater than that estimated. Specifically, the State's Department of Health and Rehabilitative Services has recently estimated an influx of 1,000,000 aliens during the past 30 years and 230,000 permanently located aliens in the past 15 years. The State believes and alleges that the number of aliens in the State will not decrease in the foreseeable future, but, indeed, will increase as influenced by the economic and political upheaval in many of the islands and countries that have direct access to Florida.

43. The massive uncontrolled influx of aliens constitutes an immigration emergency that imposes tremendous economic costs upon the State of Florida, its citizens and its taxpayers. Although the United States provides certain

programs and funds, such as AFDC, Medicaid, SLIAG grants (State Legalization Impact Assistance Grants authorized by the Immigration Reform and Control Act of 1986, Pub. L. 99-603), and Refugee Assistance grants to care for some aliens, these programs and funds are limited at best and pay only a small fraction of the costs incurred on behalf of aliens. For example, the Refugee Assistance grants have dropped 47.79% since 1986, while the national refugee population has increased 47.46%. Domestic Refugee Resettlement Packet, prepared by the State of Oregon Refugee Program, p. 23 (1994). Moreover, Title VI Bilingual Education experienced a 47% decline in real expenditures between 1980 and 1991. As noted by one commentator, this occurred at a time (1985 to 1990) when the number of students who were considered "limited English proficient" was rising by 52%. Sharry, "Myths, Realities and Solutions," 67 Spectrum: The Journal of State Government 20, 21 (Winter 1994). Thus, while the level of immigration has increased, the federal funds available to meet the needs of such aliens have significantly decreased from their original inadequate levels.

44. The State of Florida is and has been involved in two state-federal "cooperative programs." The purpose of these federal programs is to help states assist persons in need. In each program, the State is required to contribute state dollars in order to obtain a certain amount of federal funding. The two programs in which Florida has participated and continues to participate are:

(a) Medicaid — as provided for under 42 U.S.C. § 1396b and implemented under 42 C.F.R. § 435.406; and

(b) Aid to Families with Dependent Children ("AFDC") — as provided for under 42 U.S.C. § 602 and implemented

under 45 C.F.R. §§ 233.50, 233.51, and 233.52.

By reason of restrictions contained in the foregoing statutes and regulations, funds in the Medicaid and AFDC programs either are very limited or are not available for many aliens, in particular the undocumented. Thus, the State cannot be reimbursed for any expenditures made on behalf of such ineligible aliens. Florida has no choice but to respond to the needs of aliens within the State, even though Florida is not paid for the cost of providing such assistance.

45. Consequently, the State of Florida, its political subdivisions and local government entities, are *forced*, by the Federal Abdication and Default Policy, to absorb the ever--increasing costs of providing care for aliens who enter and reside here as a result of such Federal Policy. Similarly, the Florida Legislature and plaintiffs Dade County Public Health Trust and Dade County School Board have also been forced to utilize their own tax revenues to pay these costs.

46. The Federal Government classifies aliens in many different ways for many different reasons. Some aliens enter the United States without authorization, but thereafter attain legal status, either because they are political refugees or for other reasons; some enter and remain in the United States without authorization; some enter legally but are now here illegally for a variety of reasons, including expiration of their visas; some entered this country, either legally or illegally, but are now incarcerated for crimes, and because of their resulting criminal records will never be eligible for legal residence in this country.

47. The aggregate cost of dealing with the uncontrolled and massive influx of aliens to Florida has been tremendous, while the bulk of the tax revenues paid by these

aliens flows to the Federal Government. It is true that the costs incurred by the State for any individual alien may differ, depending upon changes in the alien's status, education, and ability to work. Aliens who eventually attain legal status may become self-sufficient, as they can work, pay taxes, and buy medical insurance. Plaintiffs do not denigrate the ultimate positive contributions of such legal aliens to the State, and the cultural diversity and richness brought by these immigrants. However, *until* an alien attains a legal status and self-sufficiency, the cost of that alien to the State is significant on an individual basis, and overwhelming in the aggregate. Aliens need basic education, immunization from contagious diseases, food, housing, public transportation, and health care. Additionally, to maintain the health, safety, and welfare of the entire community, plaintiffs must provide correctional facilities and services for criminal aliens.

48. Moreover, many aliens *never* attain legal status, yet are allowed by the Federal Abdication and Default Policy to remain in the United States indefinitely, without regard to their ability to support themselves and without regard to the financial impacts such persons have on state and local governments. Such aliens cost the State huge amounts of money each year: for their education in the English language and other schooling; for their medical care; for their health and welfare; for their legal defense; for their supervision and incarceration when they commit crimes; and for other costs to the public infrastructure.

FLORIDA IS COMPELLED TO PAY THE COST OF THE FEDERAL ABDICATION AND DEFAULT POLICY

49. By reason of the decision of the United States Supreme Court in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), it is clear that the Dade County School Board and other school boards within the State may not

constitutionally refuse to provide education to any child, even if such child is here illegally. In addition, the State of Florida and its public school systems operated by the School Board of Dade County and the school boards in Florida's other 66 counties are required by federal law to provide English language instruction to all students who are not proficient in English, regardless of whether these children or their parents entered or remained in the United States in violation of the law. *See Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); Equal Opportunity Act of 1974, § 204(f), 20 U.S.C. § 1703; *Morales v. Shannon*, 516 F.2d 411 (5th Cir.), *cert. denied*, 423 U.S 1034, 96 S.Ct. 566, 46 L.Ed.2d 408 (1975). Accordingly, Florida provides an "ESOL" (English for Speakers of Other Languages) program pursuant to Florida Statutes §§ 233.058 and 236.081 (1993). Many students in the ESOL programs are aliens, children of aliens, or illegal aliens. Despite the federal mandate to provide education to illegal alien children on a nondiscriminatory basis, and despite defendants' responsibility for the presence of undocumented aliens as a result of their Federal Abdication and Default Policy, the defendants do not contribute any reasonable amount toward the cost of ESOL instruction to such aliens.

50. On February 28, 1994, The Miami Herald reported that the number of foreign-born children in the Dade County schools approached the number of refugees who entered that school system during the Mariel boatlift of 1980, and may exceed that number. The report continued:

> The federal government pays less than three percent of Dade County's total expenses for foreign-born kids . . . school leaders say the funding gap has reached crisis proportions.
>
> . . .

> The federal government doesn't reimburse Florida school districts for all their costs in teaching immigrant children. Dade, for instance, says it only receives (sic) $8.6 million last year in federal aid for immigrant education, but it costs 35 times that: $300 million or about $4,000 apiece for the district's 74,872 foreign-born students. That figure, however, includes students from countries such as Cuba, who are now are (sic) legal residents or U.S. citizens.
>
> The district gets nothing for students who are here illegally. Yet it costs $68.2 million to educate the district's 16,395 undocumented students, administrators say.
>
> . . .
>
> A Dade County immigration impact report... also flatly states the district can no longer meet its goal of constructing 56 new schools between 1989 and 1997 [funded by local property tax funds].
>
> 'The substantial influx of refugees was not anticipated,' it reads. 'As a practical matter, the district has now tapped all available state and local funding sources for its capital construction program.'

"Schools Seek Funds For Foreign Influx," The Miami Herald, February 28, 1994, at 1B. As noted by an official of the Dade County School Board, the failure of the United States to pay for these aliens results in "taking [the State of Florida's] money away from other students." Id. Plaintiff School Board of Dade County asserts that the above-cited facts are true and correct.

51. In addition to education and emergency medical care, it has been asserted that Florida has a legal obligation to provide other benefits to aliens, both legal and illegal. *See, e.g.*, *In the Interest of Guzman*, Case No. 93-157554 (D003), (Fla. 11th Cir. Ct. 1993) and *In the Interest of Remy*, Case No. 94-15030 (D003) (Fla. 11th Cir. Ct. 1994), in which attempts were made to obtain Special Immigrant Juvenile Status for undocumented alien children by claiming a need for intervention by the State's foster care system. These are two examples of numerous dependency proceedings where the State has been challenged for refusing to accept jurisdiction and responsibility for unaccompanied alien children who are, or should be, in federal custody. But even if no legal obligation exists, as a practical matter plaintiffs have no choice but to expend state and local government funds to support, educate, house, care for, feed, supervise, and incarcerate many aliens who enter the State as a result of the Federal Abdication and Default Policy, or else suffer injury to its sovereign interests through increased crime, disease, illness, homelessness, and the many problems presented by an uneducated or poorly educated populace.

THE COSTS PAID BY FLORIDA FOR ALIENS WITHIN ITS BORDERS

52. The costs paid by plaintiffs for aliens within the State (whether or not "undocumented") as a result of the Federal Abdication and Default Policy constitute a severe financial burden that is difficult to calculate. Indeed, it is virtually impossible in many instances to distinguish between costs incurred for "undocumented aliens" as opposed to other aliens, either because plaintiffs may not seek such information (as has occurred in the case of the School Board of Dade County, pursuant to a consent agreement executed in 1990) or because the programs in which such aliens are participating do not make such distinctions. Any attempts to distinguish costs

of "undocumented" aliens are further complicated by the fact that many "undocumented" aliens live in "mixed" households, where some residents are "legal" and others are not. *See*, Sharry, "Myths, Realities and Solutions," 67 Spectrum: The Journal of State Government, 20, 21 (Winter 1994).

53. Plaintiff State of Florida has expended *at least* the following unreimbursed amounts for the care, welfare, supervision, or incarceration of aliens within the time frames indicated, and believes the unreimbursed expenditure is substantially in excess of such amounts:

A. EDUCATION COSTS	AMOUNT
1. English For Speakers of Other Languages, 1988–1993	$954.7 million[1]
2. School Nutritional Food Program, 1980–1993	$10.2 million
3. Adult Education, 1992	$23.5 million
4. Public Infrastructure 1980–1993	$142.5 million
TOTAL EDUCATION COSTS	**$1.131 billion**

B. HEALTH CARE COSTS	AMOUNT
1. Medicaid, 1989–1993	**$70.3 million**

[1]Includes total cost of providing ESOL instruction to all non-English speaking students, whether U.S. citizens, legal or undocumented aliens.

C. SOCIAL SERVICES		AMOUNT
1.	Aid To Families With Dependent Children, 1991–93	$.4 million
2.	Food Stamps Administration, 1991–1993	$13.4 million
	TOTAL SOCIAL SERVICES COSTS	**$13.9 million**

D. CORRECTIONS	AMOUNT
1. Mariel Reimbursement Program, 1988–1993	$52.6 million
2. Other Incarcerations, 1988–1993	$130.7 million
3. Probation and Parole, 1980–1993	$33.1 million
4. Public Infrastructure 1980–1993	$33.6 million
TOTAL CORRECTIONS COSTS	**$250.0 million**
TOTAL COSTS	**$1.465 billion**

The State of Florida continues and will continue to bear such costs.

54. Plaintiff School Board of Dade County has expended in excess of the following unreimbursed amounts in providing educational programs to aliens within the time frames indicated:

FISCAL YEAR	AMOUNT
1993–1994 (Projected)	$210,993,295
1992–1993	$190,270,232
1991–1992	$196,180,429
1990–1991	$191,102,987
1989–1990	$198,792,896
TOTAL	**$987,339,839**

The School Board of Dade County, Florida, continues and will continue to bear such costs.

55. Plaintiff Dade County Public Health Trust has expended in excess of the following unreimbursed amounts in providing health care services to aliens within the time frames indicated:

YEAR	AMOUNT
Unreimbursed costs for undocumented aliens, October 1, 1990, through September 30, 1993	$102.0 million
Unreimbursed costs for other aliens, 1992–1993	$66.7 million
TOTAL	**$168.7**

The Dade County Public Health Trust continues and will continue to bear such costs.

THE FEDERAL GOVERNMENT'S REFUSAL TO TRANSFER FEDERAL FUNDS APPROPRIATED FOR AN IMMIGRATION EMERGENCY SUCH AS FLORIDA'S

56. Forcing Florida to bear a disproportionate share of the costs imposed by the Federal Abdication and Default Policy is a violation of the rights of the State of Florida. This flagrant violation of the rights of the State of Florida described herein is illustrated by the defendants' failure to take the action necessary to make available to the States the Immigration Emergency Fund appropriated by the Congress over eight years ago.

57. In 1986 Congress adopted the Immigration Reform and Control Act of 1986, Pub. L. 99-603, § 113, 100 Stat. 3359, which amended 8 U.S.C. § 1101, to authorize the disbursement of funds upon the President's determination that an immigration emergency existed (the "Immigration Emergency Fund"). This amendment authorized an annual appropriation sufficient to maintain a balance of $35 million, such funds to be used to reimburse state and local governments providing assistance in meeting an immigration emergency.

58. A further amendment to 8 U.S.C. § 1101, adopted in 1990, allowed the Attorney General to disburse up to $20 million a year from the available $35 million in the Fund without the President's determination of an immigration emergency. Pub. L. 101-649, § 705, 104 Stat. 5087. Further amendments to 8 U.S.C. § 1101 required the Attorney General to prescribe regulations to delineate scenarios that would be

deemed to constitute an immigration emergency, and the process by which states are to be paid for costs incurred as a result of such an emergency. Pub. L. 102-140, Title VI, § 610, 105 Stat. 832.

59. Although the initial appropriation of $35 million was authorized in 1986, to date none of the Immigration Emergency Fund has been disbursed to the State of Florida or to any other state, and by these delays the Federal Government has saved itself as much as $280 million.

60. Further, as a result of the Attorney General's refusal and/or failure to develop the necessary regulations to disburse the funds, no money from the Immigration Emergency Fund has been made available to the State of Florida or any other State pursuant to the 1990 and 1991 amendments.

THE NEED FOR APPROPRIATE RELIEF FROM THIS COURT

61. Plaintiffs have no administrative remedy to pursue, to influence or to change the decisions and policies of defendants, which decisions and policies permit and cause a massive and uncontrolled influx of aliens, including undocumented aliens, to enter and remain in the United States and the State of Florida.

62. Plaintiffs have no administrative remedy they may pursue by which they could compel defendants to comply with their statutory and constitutional obligations to provide nondiscriminatory funding to assist plaintiffs in providing services and assistance to aliens.

63. Plaintiffs have requested on numerous occasions that defendants provide funds to assist plaintiffs with the costs they have incurred. Defendants have refused or otherwise failed to provide such funds. In fact, although Congress specifically appropriated the funds eight years ago to create the Immigration Emergency Fund as delineated in paragraphs 56–60, such funds still have not been made available for states such as Florida. Without such funds, plaintiffs will continue to have to pay a disproportionate share of the costs of a national problem that is a direct consequence of defendants' decisions to avoid their constitutional and statutory duties.

64. The national political process has provided no adequate safeguard against this discrimination. The costs imposed by the continuing influx of aliens on state and local governments are disproportionately concentrated in only a few states, including Florida. Representatives of other states have a political incentive to ignore such costs, or to provide only small and thus far ineffective tokens of assistance, rather than ensure that they are borne equitably. Accordingly, unless this Court grants appropriate relief, the State of Florida and the other plaintiffs will continue to incur and have to pay such costs as are described herein in the future.

COUNT I

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: FAILURE TO DEVELOP REGULATIONS GOVERNING DISBURSEMENT OF THE IMMIGRATION EMERGENCY FUNDS; DECLARATORY AND INJUNCTIVE RELIEF

65. Plaintiffs repeat and reallege the allegations in paragraphs 1 – 64, and incorporate them by reference herein.

66. This is an action for review of agency action and for injunctive relief pursuant to 5 U.S.C. § 702 and/or 5 U.S.C. § 706.

67. Eight years ago, Congress appropriated federal funds to assist states such as Florida in meeting what it deemed an "immigration emergency." Congress provided an initial appropriation of $35 million for this purpose to the Immigration Emergency Fund, and with an annual appropriation thereafter sufficient to maintain a balance of $35 million in this Fund. However, the Federal Government has never recognized the existence of an immigration emergency.

68. An immigration emergency, as contemplated by Pub. L. 99-603, has existed in Florida since before 1986, and continues to exist. The delay in providing for the disbursement of the Immigration Emergency Fund is unreasonable and unlawful and has served to save the Federal Government up to $280 million. On information and belief, the defendants will continue to delay disbursement of the emergency funds unless enjoined from doing so by this Court.

69. Despite the Congress' clear intent to provide even this modest and ultimately inadequate measure of assistance, defendant Attorney General still has failed to develop the necessary regulations to disburse the Immigration Emergency Fund pursuant to Pub. L. 102-140, Title VI, § 610. Once the regulations for disbursement are developed and approved, the Attorney General has the authority to disburse up to $20 million of the total fund each year, without a Presidential declaration of an immigration emergency. Had such a plan been timely adopted by the Attorney General, some disbursements could have been made, and as much as $60 million could have been available to the States, including Florida, over the last three years.

70. As a result of the Attorney General's failure to develop a plan to disburse the Immigration Emergency Fund, plaintiffs have expended and must continue to expend state and local government funds to support, educate, house, feed, supervise, incarcerate and provide medical care to many aliens who enter Florida, or else suffer injury to its sovereign interests through increased crime, disease, illness, homelessness and the many problems presented by an uneducated or poorly educated populace.

71. The Attorney General has failed and continues to fail to comply with her duties to develop a plan to disburse the Immigration Emergency Fund.

72. Plaintiffs do not have an adequate remedy in any other court.

WHEREFORE, plaintiffs pray for an order directing the Attorney General to comply with her duties under 8 U.S.C. § 1101, as amended by Pub. L. 99-603, Pub. L. 101-649 and Pub. L. 102-140; develop a plan providing for the disbursement of the Immigration Emergency Fund; grant to the State of Florida its just share of such funds; and grant such other relief as may be just and proper under the circumstances.

COUNT II

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION; FAILURE TO ENFORCE AND EFFECTIVELY ADMINISTER IMMIGRATION LAWS; DECLARATORY AND INJUNCTIVE RELIEF.

73. Plaintiffs repeat and reallege the allegations in paragraphs 1 – 64, and incorporate them by reference herein.

74. This is an action for review of agency action and for declaratory and injunctive relief pursuant to 5 U.S.C. § 702 and/or § 706.

75. The administrative actions and omissions of the United States, the INS Commissioner, the Attorney General, the INS Acting Regional Director, and the INS District Director in carrying out their obligations to enforce and effectively administer the immigration laws are an abuse of their discretion, representing at best an arbitrary, capricious, and irrational Federal Abdication and Default Policy.

76. Defendants have failed and will continue to fail in their duties to effectively enforce and administer the immigration laws or to accept the financial responsibility for such failure.

77. Plaintiffs have no choice, by legal or practical requirement, but to pay for the cost of defendants' Federal Abdication and Default Policy. Plaintiffs must expend funds to incarcerate, supervise, care for, house, feed, support and educate the massive influx of aliens who reside here. If they do not provide such services, the State will suffer injury through increased crime, disease, illness, homelessness, and the many problems presented by an uneducated or poorly educated

populace. Moreover, the public health and safety of the State will continue to be materially and adversely impacted.

78. Defendants' Federal Abdication and Default Policy, and the actions taken to implement such policy, constitute an abuse of discretion, and are arbitrary and capricious, in that Florida and its political subdivisions have effectively been required to pay a grossly disproportionate share of the costs of a national problem as compared to almost all other states, resulting in a studied inequality among the states contrary to a fundamental premise of the United States Constitution.

79. The sovereign interests of the State and its political subdivisions have been violated by the abdication of federal responsibility represented by the Federal Abdication and Default Policy, in that these plaintiffs have no ability to control immigration, yet have been forced to pay for its adverse impacts to the public health and safety of the State.

80. Under the circumstances described herein, the defendants' abdication of administrative responsibility, being repeated and continuous over many years with full knowledge of its material and adverse impact on the State of Florida and the other plaintiffs, is judicially reviewable by this Court.

81. Although defendants could of course satisfy their legal obligations by carrying out their duties to enforce the immigration laws effectively, the arbitrary and irrational burden visited on the plaintiffs could equally be alleviated by an ongoing restitution to the plaintiffs of the prospective costs imposed on them by the Federal Abdication and Default Policy from this date forward. For the reasons stated in paragraph 14, a broad-scale injunction against defendants' unlawful activity might raise troubling issues of judicial power. However, no such issues would be raised by a mandatory injunction

compelling the ongoing restitution to the plaintiffs of the costs imposed on them by the Federal Abdication and Default Policy as an alternative remedy until such time as defendants bring their enforcement policies into compliance with applicable law.

WHEREFORE, plaintiffs pray that this Court:

(i) enter a declaratory judgment determining that defendants have failed to comply with their duties under applicable laws;

(ii) as relief for the past and continuing violations of applicable laws by such defendants, enter a mandatory injunction directing the defendants to cease their policy of arbitrary and irrational non-enforcement of the immigration laws or, in the alternative, to provide to plaintiffs equitable restitution of the amounts that plaintiffs are and will continue to be required to spend as a result of defendants' unlawful actions and inactions; and

(iii) grant such other relief as may be just and proper in the circumstances.

COUNT III

DECLARATORY AND INJUNCTIVE RELIEF AS TO CERTAIN FEDERAL COOPERATIVE PROGRAMS; UNCONSTITUTIONALITY OF PROGRAM RESTRICTIONS.

82. Plaintiff Chiles and the State of Florida repeat and reallege the allegations contained in paragraphs 1 – 64, and incorporate them by reference herein.

83. This is an action for declaratory and injunctive relief.

84. As set out in paragraph 44, plaintiff State of Florida is currently involved in two state-federal "cooperative programs," which are designed to help states assist persons in need. In each program, the State is required to contribute state dollars in order to obtain a certain amount of federal funding. These two programs are Medicaid and AFDC.

85. In particular, defendants United States and the HHS Secretary are obligated to assist the State of Florida to meet the needs of aliens present within the State and other persons present in the State as a result of defendants' actions and inactions.

86. Defendants United States and the HHS Secretary may not constitutionally discriminate in their application of the Medicaid and AFDC statutes against states with large populations of needy aliens such as Florida.

87. Florida has no control over immigration and must provide assistance to its needy. It is arbitrary, irrational, and unconstitutional for defendants not to provide Medicaid

and AFDC assistance to Florida on the same basis that other states are assisted. That basis is need.

88. The statutory and regulatory restrictions applied to federal Medicaid and AFDC programs are arbitrary, irrational, discriminatory, and unconstitutional insofar as they deny Florida payment of costs it would be entitled to claim but for a person's alien status. These statutes and rules have been construed by defendants United States and the HHS Secretary to provide that funds in the Medicaid and AFDC programs are either very limited or are not available for many aliens, in particular the undocumented, and that the State cannot be paid for any expenditures made on behalf of ineligible aliens. The vast majority of states participating in the Medicaid and AFDC programs receive payments to assist all or nearly all their needy recipients. Florida is an exception to this norm, due solely to the presence in the state of a large population of aliens, many of whom are here due to the defendants' Federal Abdication and Default Policy.

89. The defendants' failure to compensate the plaintiffs for making need-based payments to aliens, while assisting virtually all other states with virtually all of their expenditures to provide need-based medical care and aid to families with dependent children, effectively penalizes plaintiffs for having a needy population that is disproportionately comprised of aliens, largely as a result of defendants' Federal Abdication and Default Policy. Statutory provisions and administrative regulations that penalize plaintiffs for having a disproportionately large population of needy persons who are aliens deprive Florida of the "equal footing" it was to be afforded on its entry into the United States and places it in a studiedly unequal position from most of its sister states.

90. To make the State of Florida and its political subdivisions responsible for the medical care and welfare expenses of such aliens directly violates the fundamental principles of federalism inherent in the United States Constitution, the Tenth Amendment, and Article IV, § 4.

91. To make the State of Florida and its political subdivisions responsible for the medical care and welfare expenses of such alien residents in Florida while providing much more adequate financial assistance to help other states care for populations that are not foreign born, directly violates the norm of equality implicit in Article I, § 8, clause 1 of the United States Constitution.

92. Defendants United States and the HHS Secretary have violated Florida's rights by effectively "commandeering" the legislative and political processes of the State, including those of its political subdivisions, and making them responsible for the care and welfare of aliens generally.

93. Defendants United States and the HHS Secretary are, in effect, punishing Florida for conditions created by the Federal Government's abdication of its statutory and constitutional responsibilities.

WHEREFORE, plaintiffs Chiles and the State of Florida pray for entry of a judgment declaring the above-cited restrictions on alien coverage either contrary to the applicable statutes or unconstitutional in failing to provide for payments to the State of Florida for expenditures on behalf of aliens; and further, plaintiffs pray for an order directing defendants United States and the HHS Secretary to pay to the State of Florida all Medicaid and AFDC sums that represent expenditures by the State on behalf of aliens.

COUNT IV

DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATION OF PLAINTIFFS' RIGHTS UNDER ARTICLE IV, SECTION 4, UNITED STATES CONSTITUTION AND THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

94. Plaintiffs repeat and reallege the allegations in paragraphs 1 – 64, and incorporate them by reference herein.

95. This is an action for declaratory and injunctive relief.

96. Because of defendants' gross failure to control immigration, hundreds of thousands of aliens reside in Florida, placing numerous and extremely heavy demands upon the State's available resources. Plaintiffs have incurred continuing costs, including, but not limited to, the costs of public infrastructure improvements, housing, feeding, medical care, education, incarceration, and parole and probation supervision, all of which are attributable to the presence of massive numbers of aliens within the State of Florida. The aliens' presence is due to the defendants' Federal Abdication and Default Policy. These expenses will not only continue, but will increase, as the result of the Federal Abdication and Default Policy not to enforce the immigration laws and the Federal Government's failure to provide financial assistance to plaintiffs to compensate for such failure.

97. The imposition on the State of Florida of these burdens by reason of defendants' abdication of their constitutional responsibility and their obligations to enforce and administer the immigration laws constitutes a violation of

Article IV, § 4 of the United States Constitution. Practically speaking, and as heretofore conceded by defendants in this Court, the abdication of their obligations by defendants has created a virtual "invasion" of the State of Florida by aliens and has seriously impaired the constitutional guarantee of a republican form of government.

98. Defendants have violated and will continue to violate plaintiffs' rights under both Article IV, § 4 and the Tenth Amendment to the United States Constitution. Although *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912) concluded that states' rights under the "Guarantee Clause" (but not the "Invasion Clause") were not judicially enforceable, this conclusion was sharply questioned in Merritt, Deborah, "The Guarantee Clause and State Autonomy: Federalism For a Third Century," 88 Colum. L. Rev. 1 (1988). The United States Supreme Court cited that article with apparent approval in *New York v. United States*, __ U.S. __, 112 S.Ct. 2408, 2433, 120 L.Ed.2d 120 (1992), acknowledging that "[m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *See also, Reynolds v. Sims*, 377 U.S. 533, 582, 84 S.Ct. 1362, 1392, 12 L.Ed.2d 506 (1964). In any case, the Tenth Amendment clearly creates judicially enforceable obligations on the United States and in favor of the states with respect to issues of state sovereignty. *See, New York v. United States, supra.*

99. Defendants have grossly ignored their own obligations with respect to immigration control, and the impacts their policies have on state and local governments. Defendants have also failed to provide financial assistance to meet the cost of their Federal Abdication and Default Policy and thereby protect plaintiffs and their constituents from the lack of political accountability that results when state and local officials must find ways to meet the cost of problems that are

imposed by federal policy. The failure to enforce the immigration laws effectively and the resulting imposition of costs on the plaintiffs, coupled with the defendants' failure alternatively to provide offsetting financial assistance, violates the Tenth Amendment and fundamental principles of federalism inherent in the Constitution.

100. Defendants have, for all practical purposes, unlawfully "commandeer[ed] the State's legislative processes" by effectively compelling the State and its political subdivisions to provide numerous costly services to aliens allowed by defendants to enter the State. New York v. United States, 112 S.Ct. 2408, 2412, citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981). Plaintiffs are thus being unlawfully forced to pay the cost of the Federal Abdication and Default Policy.

101. Defendants' actions have fundamentally impaired the sovereign rights and interests of the State, and have unlawfully imposed upon this State the economic burden of the Federal Abdication and Default Policy.

102. Defendants' actions and policies also diminish or abolish the political accountability guaranteed by Article IV, § 4 and the Tenth Amendment. Because only a small number of states are similarly affected, the political process has proven inadequate to protect Florida's rights.

103. For all practical purposes, the commandeering of the State of Florida's resources herein complained of has been as great as that involved in *New York v. United States, supra*, and is equally unconstitutional.

104. Although defendants' could satisfy their obligations under Article IV, § 4 and the Tenth Amendment by carrying out their duties to enforce the immigration laws effectively, defendants could equally meet their constitutional responsibilities through an ongoing restitution to the plaintiffs of the costs imposed on them by the Federal Abdication and Default Policy. For the reasons stated in paragraph 14, a broad-scale injunction commanding the defendants to protect Florida borders from an invasion of aliens might raise troubling issues of judicial power. However, no such issues would be raised by a mandatory injunction compelling the provision of ongoing restitution as an alternative remedy until such time as defendants bring their enforcement policies into compliance with applicable law.

WHEREFORE, plaintiffs pray that this Court:

(i) enter a declaratory judgment determining that defendants have failed to comply with their duties under the Constitution and applicable laws and that their abdication of their obligations constitutes a repeated and continuing violation of plaintiffs' rights under Article IV, § 4, and the Tenth Amendment to the United States Constitution.

(ii) enter an injunction directing the defendants to cease the policies that have subjected plaintiffs to an invasion of aliens and commandeered their legislative processes to meet the resulting costs or, in the alternative, to provide to the plaintiffs equitable restitution of the amounts that plaintiffs have been and will continue to be required to spend as a result of defendants' Federal Abdication and Default Policy; and

(iii) grant such other relief as may be just and proper in the circumstances.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 0140084
ANA CRISTINA MARTINEZ
Assistant Attorney General
Florida Bar No. 0851655
OFFICE OF THE ATTORNEY GENERAL
The Capitol — Suite PL-Ol
Tallahassee, FL 32399-1050
(904) 488-9935

and

/s/

PARKER D. THOMSON
Special Asst. Attorney General
Florida Bar No. 081225
CAROL A. LICKO
Special Asst. Attorney General
Florida Bar No. 435872
1700 Sun Bank Int'l Bldg.
One S.E. Third Avenue
Miami, FL 33131
(305) 350-7200

Counsel for the State of Florida

/s/

J. HARDIN PETERSON, JR.
General Counsel
Executive Office of the Governor
Room 209, The Capitol
Tallahassee, FL 32399-0001
(904) 488-3494

Counsel for Governor Lawton M. Chiles, Jr.

ROBERT A. GINSBURG
Dade County Attorney
Public Health Trust Division
1611 N.W. 12 Ave, W. Wing 109
Miami, FL 33136
(305) 585-1313

By: /s/
ROBERT L. BLAKE
Assistant County Attorney
Florida Bar No. 131155

Counsel for the Dade County Public Health Trust

/s/
PHYLLIS O. DOUGLAS
School Board Attorney
Florida Bar No. 126915
School Bd. of Dade County, Fla.
School Bd. Administration Bldg
1450 N.E. 2nd Avenue, Room 301
Miami, FL 33131
(305) 995-1304

Counsel for the School Board of Dade County, Florida

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LAWTON M. CHILES, JR., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION; UNITED STATES SENATORS CONNIE MACK, BOB GRAHAM, ALFONSE M. D'AMATO, DIANNE FEINSTEIN, AND KAY BAILEY HUTCHISON; UNITED STATES REPRESENTATIVES CHARLES T. CANADY, SAM M. GIBBONS, TILLIE K. FOWLER, JOHN L. MICA, PORTER J. GOSS, PETE PETERSON, DAN MILLER, C.W. BILL YOUNG, E. CLAY SHAW, JR., PETER DEUTSCH, MICHAEL BILIRAKIS, CLIFF STEARNS, BILL McCOLLUM, JIM BACCHUS, KAREN L. THURMAN, MARK FOLEY, SUSAN MOLINARI, GERALD B. SOLOMON, ROBERT K. DORNAN, RANDY CUNNINGHAM, KEN CALVERT, JERRY LEWIS, CHRISTOPHER COX, JAY KIM, STEPHEN HORN, RICHARD POMBO, PHILIP M. CRANE, H. JAMES SAXTON, BOB FRANKS, JACK FIELDS, AND MARTIN FROST; AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
David A. Price
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Date: March 7, 1996

CASILLAS PRESS INC. — 1717 K STREET NW WASHINGTON DC 20036 — 202-223-1220

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1249

LAWTON M. CHILES, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* filing this brief are the Washington Legal Foundation ("WLF"), the Allied Educational Foundation, and a bipartisan group of 36 United States Senators and Representatives from states affected by the federal government's policies with respect to enforcement of the immigration laws. The *amici* believe that the fiscal

consequences of inadequate immigration enforcement have fallen disproportionately and improperly on taxpayers in a small number of states. In the view of the *amici*, state and local governments should not have to shoulder the full financial burden of providing care and assistance to undocumented aliens in this country. The *amici* further believe, for the reasons set forth in this brief, that the federal government's failure to compensate states adequately for these burdens is unlawful.

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 100,000 supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in ensuring that the rights of states are fully respected by the federal government. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court, as well as other courts across the country.

United States Senators Connie Mack, Bob Graham, Alfonse M. D'Amato, Dianne Feinstein, and Kay Bailey Hutchison and United States Representatives Charles T. Canady, Sam M. Gibbons, Tillie K. Fowler, John L. Mica, Porter J. Goss, Pete Peterson, Dan Miller, C. W. Bill Young, E. Clay Shaw, Jr., Peter Deutsch, Michael Bilirakis, Cliff Stearns, Bill McCollum, Jim Bacchus, Karen L. Thurman, Mark Foley, Susan Molinari, Gerald B. Solomon, Robert K. Dornan, Randy Cunningham, Ken Calvert, Jerry Lewis, Christopher Cox, Jay Kim, Stephen Horn, Richard Pombo, Philip M. Crane, H. James Saxton, Bob Franks, Jack Fields, and Martin Frost are Members of Congress from both parties who are highly concerned with the inadequate enforcement of federal immigration laws. In their view, the legal residents of the states and localities

that they represent have been severely and improperly burdened by the consequences of federal inaction with regard to illegal immigration.

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, the Allied Educational Foundation is dedicated to promoting education in diverse areas of study, and is concerned with the financial impact of illegal immigration upon public education systems.

The *amici* supported Florida's position before the courts below. WLF and many of the other *amici* also participated in support of similar lawsuits filed by the States of California and Texas.

All parties have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The virtual abdication of federal responsibility over immigration enforcement, combined with the educational, medical, and law enforcement obligations that Florida and similarly-situated states must assume, has created an unfunded federal mandate of monumental proportions. The constitutionality of this mandate is being tested by numerous states seeking judicial relief that would compel the federal government to fulfill its duty either to enforce the immigration laws adequately or to compensate for the costs incurred as a result of federal nonfeasance. The magnitude of this litigation — in terms of the amount of taxpayer funds at issue, the number of states involved, and its implications for federal-state relations — justifies this Court's review.

2. With respect to Florida's constitutional claim under the Tenth Amendment, the appeals court concluded that any costs assumed by Florida are "not the product of the kind of coercion which violates the Tenth Amendment." Pet. App. A-5. The court below apparently assumed that Florida's expenditures are voluntary, not federally mandated. But federal law *does* require Florida to provide educational services to undocumented aliens. This Court should decide whether the Constitution permits the federal government to force certain states to shoulder a federally-mandated fiscal burden that is exacerbated by the federal government's own failure to carry out its statutory enforcement duties.

ARGUMENT

I. The Issue Presented Is of Nationwide Significance and Is the Subject of Nationwide Litigation

Throughout the history of the United States, immigrants have made invaluable contributions to our society. But illegal immigration has created significant demands on public resources in recent years. These demands are not spread evenly throughout the nation, but rather, are concentrated upon a small number of states, including Florida.

During the first century of the Nation's history, immigrants were numerous, but the legal relationship between the states and the federal government during that period was such that the immigrants created fewer demands on state resources. Most importantly, the states themselves were thought to have an independent authority to regulate immigration — and they did so to protect themselves against the costs of immigrants who might become public charges. *See Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1876).

Not until 1876, in *Henderson*, did this Court hold such state regulations unconstitutional. There, the Court struck down an 1824 New York State statute that required masters of passenger ships to provide either (1) a $300 bond for any foreign passenger "to indemnify the commissioners of emigration, and every county, city, and town in the State, against any expense for the relief of the person named in the bond for four years thereafter," or (2) a fee of $1.50. 92 U.S. at 267. The Court held that the statutes impermissibly interfered with the authority of Congress "to

regulate commerce with foreign nations." *Id.* at 270-71. The Court in *Henderson* also struck down similar statutes of California and Louisiana. *Id.* at 273, 275.

Today, therefore, the states themselves have no power to enforce federal immigration laws. As a consequence, the fiscal burden upon the states from immigration is greatly magnified by the federal government's failure to enforce its own immigration laws adequately. *See* Florida Compl., ¶¶ 7-11, 40-41; Pet. App. D-2 - D-4, D-14. The district court in this case acknowledged as much, even as it rejected Florida's claims:

> The Court recognizes that the State of Florida is suffering under a tremendous financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws. The State of Florida is in desperate need of relief from this overwhelming burden it is being unfairly forced to bear. The Court also recognizes that, as the State of Florida has already sought relief through the political process, the State may have no other method for obtaining relief from this burden should this Court determine that the issue is a political question.

Pet. App. B-23.

As the result of federal law requirements, and the need to protect Florida residents who are lawfully present, the State of Florida must provide costly educational services and other services to illegal aliens without federal

reimbursement. *See* Florida Compl., ¶¶ 49-55, Pet. App. D-18 - D-24. Florida must also expend considerable resources on the apprehension and incarceration of illegal aliens who commit crimes in the state. *Id.*

In response to these federal mandates, the constitutionality of the federal government's failure to provide reimbursement is not just the subject of this action, but of pending litigation brought by states across the country: Arizona,[1] California,[2] New York,[3] New Jersey,[4] and Texas.[5] These states brought suit in recognition of the impossibility of obtaining relief in the national political arena, given that the fiscal burdens from illegal immigration are now borne by only a handful of states. In light of the fact that a total of six states now have challenges pending in five federal courts of appeals, this Court should review the decision below and provide guidance to the lower courts on the issues presented.

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[1] *Arizona v. United States*, *appeal pending* (9th Cir. No. 95-15980).

[2] *California v. United States*, *appeal pending* (9th Cir. No. 95-55490).

[3] *Padavan v. United States*, *appeal pending* (2d Cir. No. 95-6156) (lawsuit brought by state legislators).

[4] *New Jersey v. United States*, *appeal pending* (3d Cir. No. 95-5685).

[5] *Texas v. United States*, *appeal pending* (5th Cir. No. 95-40721).

II. This Court Should Decide Whether Article I and the Tenth Amendment Allow the Federal Government to Force States to Bear the Fiscal Burden Resulting From the Obligation to Provide A Free Education to the Children of Undocumented Aliens

Federal law requires Florida public schools to provide a free education to illegal immigrants. This Court, in *Plyler v. Doe*, 457 U.S. 202 (1982), held that states cannot constitutionally restrict an illegal immigrant child's access to a free public education absent federal authorization. The federal government's failure to limit the flow of illegal aliens into the state means that this unfunded federal mandate imposes a significant cost on Florida taxpayers.

Neither Florida nor *amici* seek in this litigation to challenge this Court's ruling in *Plyler* or to deprive illegal alien children of an education. The question, rather, is one of fiscal accountability. As five Justices in *Plyler* itself suggested, because the federal government has exclusive authority to enforce the immigration laws, it should assume a corresponding responsibility to compensate Florida for the burden that inadequate immigration enforcement has imposed upon Florida's public schools.

The unfunded educational mandate imposed upon Florida by federal law is highly burdensome and unfair to Florida taxpayers. According to a study conducted by the Urban Institute and funded by the U.S. Department of Justice, state and local government expenditures in the 1993-94 academic year averaged $4,363 for one immigrant child. *See* Rebecca L. Clark, Jeffrey S. Passel, Wendy N. Zimmerman & Michael E. Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates For Seven States*

89 (1994). The study estimates that the education of children of illegal aliens cost Florida taxpayers $423.9 million in 1993-94. *Id.*

The estimated education costs borne by other affected states are no less dramatic: Arizona, $54.6 million; California, $1.289 *billion*; Illinois, $112.5 million; New Jersey, $146.2 million; New York, $633.8 million; and Texas, $418.9 million. The scale of these costs is unsurprising, given that millions of individuals are illegally present in this country.[6]

The federal government cannot impose such mandates upon a state without offsetting funding. This Court indicated in *New York v. United States*, 112 S. Ct. 2408 (1992), that although the federal government can create incentives for a state to operate a federally-desired program, and can offer grants conditional on the operation of such a program, it lacks the power to hijack state resources unilaterally for its own ends. *See* 112 S. Ct. at 2424, 2428.

In that case, Congress had given New York a choice between accepting ownership of certain radioactive materials or assuming liability for all damages resulting from the state's failure to take possession. The Court

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[6] Two governmental estimates indicate that, as of October 1992, the illegal alien population in the United States was over three million. The U.S. Bureau of the Census has given a range of 3.2 million to 3.8 million; an unpublished estimate from the U.S. Immigration and Naturalization Service (INS) places the size at approximately 3.379 million. *See generally* Clark, Passel, Zimmerman & Fix, *supra*, at 17-29. The Urban Institute study concluded that the INS estimate is the most reliable. *Id.* at 17.

treated this requirement as a forced subsidy, which the federal government could encourage, but could not compel. The Court explained:

> On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.

112 S. Ct. at 2428.

The opinion of the lower courts do not specifically address Florida's claim with respect to unfunded educational mandates. Rather, the appeals court concluded across the board that the federal government had not applied coercion, at least for Tenth Amendment purposes, to cause *any* of Florida's expenditures on illegal aliens.

Pet. App. A-5. But that simply is not true, in light of the requirement in *Plyler*.

Neither is it true, as Defendants contended in the court below, that the provision of a free public education to illegal aliens is solely a constitutional requirement rather than a congressional or Executive Branch mandate. The majority in *Plyler* indicated that the states would have more flexibility in limiting the access of illegal aliens to public education if the federal government were to articulate a policy authorizing such limitations. The Court repeatedly indicated that its decision hinged on the lack of a contrary federal policy concerning the education of illegal aliens. "[The] courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens." *Plyler*, 457 U.S. at 224. "[In] the area of special constitutional sensitivity presented by these cases, and *in the absence of any contrary indication fairly discernible in the present legislative record*, we perceive no national policy that supports the State in denying these children an elementary education." *Plyler*, 457 U.S. at 226 (emphasis added).

Thus, the holding in *Plyler* in no way forecloses, and in fact invites, congressional action, including action that would effectively resurrect the same state statute found invalid in *Plyler*. *See* Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. Pitt. L. Rev. 409, 430 (1983). Indeed, in *DeCanas v. Bica*, 424 U.S. 351 (1976), the Court permitted California to regulate the employment of illegal aliens — barring them from working "if such employment would have an adverse effect on lawful resident workers,"

id. at 352 — because Congress had implicitly authorized such measures.

Contrary to Defendants' contention, then, Congress, not the Constitution, has imposed the educational mandate upon Florida. This Court held in *New York* that the coercive imposition of such a mandate without offsetting compensation is unlawful. Whether the mandate is viewed "as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *New York*, 112 S. Ct. at 2429.

Defendants also sought below to avoid the holding of *New York* by relying on *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982), in which this Court upheld a federal law requirement that state utility regulators "consider" certain federal rate-making standards. But the Court found no Tenth Amendment violation there because the federal statute required "only *consideration* of federal standards," 456 U.S. at 764, making the requirement "essentially hortatory," *id.* at 770. (Emphasis in original.) The further requirement that the state adjudicate disputes arising under the standards it adopted did not amount to a federally-coerced subsidy, either: the requirement did not "grant any rights beyond those presently accorded by Mississippi law." *Id.* at 769. In upholding the federal program at issue in *F.E.R.C.*, the Court explicitly indicated that its decision "does not purport to authorize the imposition of general affirmative obligations on the States." *Id.* at 769 n.32.

Five Justices in *Plyler* argued that the federal government should share the costs associated with its failure to enforce the immigration laws effectively. Chief

Justice Burger, joined by three other Justices, stated in dissent:

> It does not follow . . . that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here. Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation.

Plyler, 457 U.S. at 242 n.1. Justice Powell indicated his agreement. *Plyler*, 457 U.S. at 241 (Powell, J., concurring). The four dissenters and Justice Powell accurately noted the jumbled logic of the current system. Only the federal government can enforce immigration laws; if the federal government fails in its enforcement, it should bear the costs of its failure. Otherwise, the states would be forced to bear costs that they are powerless to protect themselves against, an outcome that the five Justices in *Plyler* recognized as absurd.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL J. POPEO
DAVID A. PRICE
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

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BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ARIZONA, COLORADO, AND NEW JERSEY IN SUPPORT OF PETITIONERS

DANIEL E. LUNGREN
Attorney General of
the State of California
FLOYD D. SHIMOMURA
Senior Assistant Attorney General
LINDA A. CABATIC*
RICHARD M. FRANK
Supervising Deputy Attorneys General
PAUL H. DOBSON
Deputy Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 324-5475

Attorneys for Amici Curiae States
*Counsel of Record

Additional Counsel Listed On Inside

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

GRANT WOODS
Attorney General
1275 West Washington
Phoenix, Arizona
85007-2926

GALE A. NORTON
Attorney General
State of Colorado
1525 Sherman Street,
5th Floor
Denver, CO 80203

DEBORAH T. PORITZ
Attorney General of
New Jersey
R.J. Hughes Justice
Complex
25 Market Street
CN 112
Trenton, New Jersey 08625

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Pursuant to Supreme Court Rule 37.5, the signatory states respectfully submit this brief as *amici curiae* in support of the Petition for a Writ of Certiorari of Governor Lawton M. Chiles, Jr., and the State of Florida, et al.

INTEREST OF AMICI CURIAE

Petitioners (hereinafter collectively referred to as "Florida") request this Court to reinstate their claim against the federal government and certain of its officers for their breach of constitutional and statutory obligations to safeguard the borders of the United States from the massive immigration of aliens in violation of the laws of the United States. The issue is of urgent and substantial import to the *amici* states of California, Arizona, and New Jersey because of the tremendous burdens imposed upon the states by this illegal action. These states, along with Texas, have each brought similar actions against the federal government, and related litigation has been brought by public officials in the State of New York; in each case the federal government's motion to dismiss was granted and the appeals are pending in the United States Courts of Appeals in the Second, Third, Fifth and Ninth Circuits.[1] Each of these states is severely and adversely

[1] *Arizona v. United States, appeal pending* No. 95-15980 (9th Cir.); *California v. United States, appeal pending*, No. 95-55490 (9th Cir.); *New Jersey v. United States, appeal pending*, No. 95-5685 (3rd. Cir.); *Texas v. United States, appeal pending*, No. 95-40721 (5th Cir.); and *Padavan v. United States, appeal pending*, No. 95-6156 (2nd Cir.).

affected by the burdens of illegal immigration, which rightly should be borne by the federal government.

The *amici* state of Colorado, though not as severely impacted by the federal government's default in the control of immigration as California, Arizona, and New Jersey, has a significant interest in preventing the federal government from foisting its constitutional and statutory responsibilities generally on state governments. This Court reinvigorated the Tenth Amendment when it held that Congress cannot commandeer state officials and programs to implement federal mandates. *New York v. United States*, 505 U.S. 144, 161 (1992); *see also Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993) (Congressional ban on foreign export of state-owned timber invalid under Tenth Amendment). It simultaneously indicated that the Guarantee Clause may impose judicially enforceable obligations on the federal government vis-a-vis the states. *New York v. United States*, 505 U.S. 144, 185. Last year the Court found that the Commerce Clause delimits the federal government's constitutional power to regulate in areas traditionally left to state and local regulation. *United States v. Lopez*, ___ U.S. ___, 131 L.Ed.2d 626 (1995). And recently the Eighth Circuit held that the Constitution's nondelegation doctrine proscribes the unfettered delegation of federal power by Congress to the Executive Branch under the Indian Reorganization Act, at least when to do so would infringe upon threshold state interests. *South Dakota v. Dept. of the Interior*, 69 F.3d 878 (8th Cir. 1995). This case presents to this Court another aspect of federalism in the form of a controversy that goes to the core of the nation's constitutional structure –

the obligation of the federal government to protect individual states from the massive, unlawful invasion of immigrant aliens. Thus, the issue presented by Florida is of significant interest to every state in that the petition raises fundamental issues related to core principles of federalism.

SUMMARY OF ARGUMENT

Florida's claim raises an issue that is fundamental to the federalist structure of the nation – whether the federal government, by abdicating its exclusive constitutional and statutory duties to control immigration and the nation's borders, may foist upon states the financial burdens resulting from illegal immigration. Significantly, only a tiny minority of states must bear the vast bulk of the costs of illegal immigration resulting from the federal government's default.

Principles of federalism recognized by the Tenth Amendment, and the command of Article IV, section 4 of the United States Constitution for the federal government to guarantee each state a republican form of government and to "protect each of [the states] against invasion," create a judicially enforceable right against the federal government. That right mandates that the government take minimally adequate action to protect the states from the influx of illegal immigrants. The petition therefore, does not pose a nonjusticiable, "political question." Rather, the focus of this case is on the admitted abdication of explicit constitutional and statutory duties by Congress and the Executive Branch that only the federal

courts can remedy. More specifically, the judicial enforcement under Administrative Procedure Act, 5 U.S.C. § 701 et seq., is an appropriate remedy for the refusal of the federal government to meet its obligations to enforce immigration law.

This Court's delineation of the obligation of the federal government to the states to protect them from illegal immigration would resolve the current constitutional confrontation between the federal government and states heavily affected by the costs and consequences of illegal immigration. This case, furthermore, affords the Court an opportunity to provide necessary guidance to the other branches of the federal government regarding the constitutional crisis precipitated by illegal immigration. This is precisely the type of "important issue of federal law" that deserves to be settled by this Court. Supreme Court Rule 10.1(c).

ARGUMENT

THE ISSUE OF THE FEDERAL GOVERNMENT'S OBLIGATION TO PROTECT STATES FROM UNLAWFUL IMMIGRATION OF MASSIVE PROPORTIONS IS FUNDAMENTAL TO THE FEDERAL STRUCTURE OF THE NATION AND IS OF NATIONWIDE SIGNIFICANCE

A. The Facts Underlying this Case Reveal An Illegal Immigration Crisis of National Proportions.

For many years massive and virtually uncontrolled numbers of immigrants have entered into the United States in violation of federal law. The response of the

federal government has been episodic at best. For the most part, it has simply ignored the problem. The financial burden resulting from this illegal immigration presents a crisis to the handful of states in which almost all illegal immigrants reside. These states are forced to devote a substantial proportion of their limited fiscal and institutional resources in an attempt to solve a problem which the Constitution and Congress have indisputably left to the *federal* government to resolve.

That illegal immigration is a massive drain on the resources of the States of Florida, Arizona, California, Illinois, New Jersey, New York, and Texas is beyond dispute. *See* Clark, Passel, Zimmermann and Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (1994). For example, the United States Immigration and Naturalization Service (hereinafter referred to as "INS") has estimated that out of the 3.4 million illegal immigrants living in the United States in 1992, 86% were located in these seven states, and that over 1.4 million, or 43% of the national total, were concentrated in California alone; this amounted to 4.6% of California's population. *Id.* at ii and 5-6. The illegal immigrant population will increase by almost 300,000 annually, with about 125,000 of these persons settling in California. *Id.* at ii and 76.

The costs of illegal immigrants to the seven most heavily impacted states are astronomical. These states have been estimated to spend more than $471 million annually for the estimated 21,395 incarcerated illegal aliens. *Id.* at ii and at 8, Table 1.4. In California, which houses 71 percent of these incarcerated illegal aliens, the annual cost estimate is $368 million. *Id.*

Annual education costs for children of illegal immigrants for these states are estimated to exceed $3 billion. *Id.* at 11, Table 1.6. The seven most heavily-affected states estimate annual emergency services costs attributable to illegal immigration at more than $420 million. *Id.* at 13, Table 1.7. Yet these three categories of costs "are only a fraction of the total costs of undocumented immigrants." *Id.* at iv. These costs are not recouped by revenues generated from illegal immigrants.[2]

To date the federal government has done little to stem the tide of illegal immigration or relieve the burden it imposes upon the states. House Concurrent Resolution 218, entitled "Concurrent Resolution Setting Forth the Congressional Budget for the United States Government for the Fiscal Year 1995," adopted by Congress in 1994, expressly acknowledges the government's default in Section 35:

> (a) Findings. – The Congress finds that –
>
> (1) the Federal Government is solely responsible for setting and enforcing national immigration policy;

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[2] For example, the General Accounting Office estimated illegal immigration would cost California roughly $2.35 billion per year but would generate $2.4 billion in annual revenue to the federal and state governments. California, however, would receive only $1.1 billion of this revenue – with the rest going to the federal government. U.S. General Accounting Office, Illegal Aliens: Assessing Estimate of Financial Burden on California at 6 (1994), discussed in *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, Note, 108 Harvard Law Review 1643, 1645-1646 (1995).

> (2) the Federal Government has not adequately enforced immigration laws;
>
> (3) this weak enforcement has imposed financial costs on State and local governments;
>
> (4) the Federal Government has failed to investigate and prosecute Federal wage and hour violations, thus creating incentives to hire persons illegally in the United States and exacerbating the problem of illegal immigration;
>
> (5) States must incur costs for incarcerating undocumented persons convicted of State and local crimes, educating undocumented children, providing emergency medical services to undocumented persons, and providing services incidental to admission of refugees under the Refugee Admissions and Resettlement Program; and
>
> (6) the Federal Government has an obligation to reimburse State and local governments for costs resulting from the costs described in this subsection.

H.C.R. 218 [§ 35], 103d. Cong., 2d Sess., 140 Cong. Rec. H. 2998 (May 4, 1994.); 140 Cong. Rec. H. 3135-3149 (May 5, 1994); Cong Rec. S. 5628-5634 (May 12, 1994).

The President's proposed budget for fiscal year 1996 shows that for the entire nation the federal government's spending on federal immigration programs was less than $1.9 billion in 1993. Office of Management and Budget, Budget of the United States Government, Fiscal Year, 1996 at 73, Table 5-1.[3] Assistance to all the states amounted to

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[3] Excerpts of this document were attached by respondents as an addendum to the Brief for the Appellees in the Court of Appeals below.

$29 million. *Id.* For 1996, the government proposed roughly $3 billion for federal programs and a mere $550 million for state assistance. *Id.* Thus, even the *proposed* federal assistance to *all* states is less than half of what the General Accounting Office estimates are California's uncompensated annual costs alone, and less than a quarter of California's actual expenditures. *Id.*

Thus, the federal government's own findings demonstrate the utter failure of Congress and the Executive Branch to maintain the security of the nation's borders against illegal immigration. This abdication of federal responsibility has caused the states to shoulder the massive burden of illegal immigration through the appropriation of state funds to provide services to illegal immigrants and to pay for police and correctional services necessary to protect residents from the increase in crime resulting from illegal immigration.

B. Whether the Federal Government Has the Duty to Protect the States Against the Massive Influx of Immigrants in Violation of Federal Law is an Issue of Major Significance.

The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). This case presents the vital question of whether the federal government may permit individual states to "sink" under the burden of illegal immigration through a conscious decision to withhold the

resources necessary to protect those states from an invasion of illegal immigrants. This case also provides the opportunity for the Court to further define the federal government's duty to guarantee each state a republican form of government; the federal obligation to protect each of them from invasion under Article IV section 4 of the Constitution[4]; and the government's duty not to infringe upon state sovereignty protected by the Tenth Amendment of the Constitution.

These issues go to the very foundation of the structure of our government. "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The nation's federal structure is premised on the principle that a structure of dual sovereignty maximizes the freedom of the individual:

> The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.

United States v. Lopez, ___ U.S. ___, 131 L.Ed.2d 626, 649 (1995) (Kennedy, J., concurring). This case directly presents the question of whether the federal government

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[4] Article IV section 4's commanding language that "the United States shall" is the only instance where the United States government, by its corporate name, is given a duty in the Constitution. *See* Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L.R. 513, 523 (1962).

may evade political and financial accountability for illegal immigration; and whether it may consciously leave to the states the burdens of such immigration.

The responsibility for setting of immigration policy falls within the exclusive domain of the federal government. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). This Court has recognized that federal policy toward aliens is interrelated to both the duty to maintain a republican form of government, *see Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1951), and the duty to protect the states from invasion. *See The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889). Accordingly, where the conscious and persistent failure of the federal government to enforce its policy against illegal immigration allows the massive encroachment of aliens within the borders of several states that currently exists, it follows that the government has failed to meet its obligations under Article IV, section 4.

This breach of duty also implicates the concept of state sovereignty confirmed in the Tenth Amendment. In *New York v. United States*, 505 U.S. 144, 188 (1992), this Court held that "[w]hatever the outer limits of [state] sovereignty, may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program." In other words, Congress "may not conscript state governments as its agents." *Id.* at 178. The federal government's failure to meet its constitutional duty under Article IV, section 4, forces Florida and similarly-situated states to take action to address the burdens of illegal immigration. This, in effect, makes the states unwilling agents of the federal government. Florida and six other states are forced to appropriate a substantial amount of scarce *state* funds to meet the costs of

illegal immigration, thus forcing them to conform their legislative and budgetary agendas to meet obligations which are properly the responsibility of the *federal* government. This, in turn, results in the commandeering of the state's fiscal resources and legislative agenda to meet federal needs. *Cf. New York v. United States*, 505 U.S. at 185.

This case does not involve a *direct* command on the States to legislate or administer a federal program. Rather, it represents a conscious and deliberate default by the federal government to either perform its constitutional and statutory duties, or, alternatively, to assist the few states that must pay the costs of this *national* policy. That the federal government has chosen to default rather than legislate state financial responsibility is no less a derogation of state sovereignty. The federal government can violate state sovereignty in ways other than by formal command to a state to enact a certain policy or organize governmental functions in a certain way. *Cf. United States v. Lopez*, ___ U.S. ___, 131 L.Ed.2d 626, 653 (concurring opinion of Kennedy, J.).

It simply defies logic to suggest that federal immigration policy can be carried out without any consideration for the impact on sovereign states. After all, it is the states which must bear the brunt of federal policy as it concerns undocumented aliens residing in the United States.[5] This case starkly demonstrates that fundamental principles of dual sovereignty and political accountability are placed

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[5] This Court has acknowledged that a state obligation which in the abstract appears voluntary may, in fact, not be so. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

in jeopardy by the federal government's abdication of congressionally-mandated responsibility, just as certainly as if Congress had acted through coercive legislation aimed directly at the states. *Cf. New York v. United States*, 505 U.S. 144, 185 (1992).

In sum, *amici* submit the issue of whether under Article IV, section 4 and the Tenth Amendment, the federal government has the duty to protect states from illegal immigration and the effects of such illegal immigration raises a fundamental issue of federalism that needs to be resolved by this Court. Supreme Court Rule 10.1(c).

C. Florida's Claim Raises an Important Issue Regarding the Justiciability of Claims Under Article IV, § 4 of the Constitution and the Tenth Amendment.

Florida presents two claims, one constitutional and the other statutory. The former is premised on the direct obligation of the federal government to protect Florida from illegal immigration. The latter seeks declaratory and injunctive relief, alleging a failure of the United States and federal immigration officials to carry out their statutory obligation to enforce and effectively administer federal immigration laws.

While the claims presented by Florida in this case may, to some extent, be characterized as "political," the fact a case may deal with a political subject does not alone make it nonjusticiable. *Baker v. Carr*, 369 U.S. 186, 217 (1962). While the courts are ill-equipped to formulate national policies or develop standards for matters that do

not present a legal issue, the judiciary's task is to apply traditional rules of statutory construction to determine the nature and scope of duties imposed upon federal officers and agencies. *Japan Whaling Assoc. v. American Cetacean Society,* 487 U.S. 221, 230 (1988).

In a case where a Guarantee Clause violation is alleged, it is the nature of the claim that determines whether the case is justiciable. *Cf. Baker v. Carr,* 369 U.S. at 211, 217; *Reynolds v. Sims,* 377 U.S. 533, 582 (1964). This Court in *New York v. United States,* 505 U.S. 144, 185 (1992), indicated that certain claims brought under the Guarantee Clause of Article IV section 4 of the Constitution are in fact justiciable. *See also* Merritt, *The Guarantee Clause and State Autonomy; Federalism for a Third Century,* 88 Colum. L. Rev. 1, 76 (1988).

This case raises a fundamental issue regarding the justiciability of a state claim of duty owed directly to it as a sovereign state by the federal government. The constitutional duty to protect the states from "invasion" is specific. The question for the judiciary is whether the massive influx of illegal immigrants constitutes an invasion under Article IV, section 4. That is a matter of legal interpretation. There are a number of specific statutory duties imposed upon the Attorney General and the INS related to the control of immigration. *See, e.g.,* 8 U.S.C. § 1103, subsec. (a) and (c), § 1252 subsec. (a)(2), (i), and (j). Florida's claims do not involve development of immigration policy but, rather, its enforcement. It involves an interpretation of constitutional and statutory duties – a task fully within the competence of the federal courts. *Japan Whaling Assoc. v. American Cetacean Society,* 478 U.S. 221, 230 (1988).

Moreover, this Court held in *INS v. Chadha* 462 U.S. 919, 940-941 (1983), that the plenary authority of Congress over immigration does not prevent the Court from reviewing a challenge premised on the ground that the federal government's action in the field of immigration violates another provision of the Constitution. The principle set forth in that case is directly applicable here.

The issue presented by Florida's petition is important to every state and is central to an understanding of the balance between dual sovereigns in the federal structure of our nation. The words of Justice Kennedy in *United States v. Lopez* are particularly applicable to this case:

> . . . [I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . [S]ome Congresses have accepted responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, see *Public Citizen v. Department of Justice*, 491 U.S. 440, 466, 105

> L.Ed.2d 377, 109 S.Ct. 2558 (1989); *Rostker v. Goldberg*, 453 U.S. 57, 64, 69 L.Ed.2d 478, 101 S.Ct. 2646 (1981), the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."

___ U.S. ___, 131 L.Ed.2d 626, 649-650 (Kennedy, J., concurring.)

In this case the federal balance has been tipped too far by the failure of the Legislative and Executive branches to fulfill their obligation to the states. It is apparent that this default to a large extent stems from the fact that only a small minority of states are heavily affected by illegal immigration. The political branches have proven incapable of restoring the federal balance. Judicial intervention is therefore imperative. This Court, therefore, should grant certiorari to permit further consideration of the justiciability of Florida's claims.[6]

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[6] In seeking this Court's review, Florida correctly observes that fashioning a judicial remedy in this case does not lie beyond a court's competence, and that the district court has available to it a number of remedies including declaratory relief, injunctive relief and equitable restitution. (Petition for Writ of Certiorari at 27-29.) The *amici* states will not repeat Florida's arguments here, but would underscore the point that this Court allows district courts broad discretion to remedy constitutional violations. *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976).

D. Florida's Claim Raises Important Issues Regarding The Availability of Relief Against The Federal Government Under the Administrative Procedure Act for Failing to Protect a State from Illegal Immigration.

Under the Administrative Procedure Act, specifically 5 U.S.C. § 702, a person adversely affected by agency action is entitled to judicial review. Agency action includes action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706. The Administrative Procedure Act provides for review of statutory and constitutional claims. 5 U.S.C. § 706(2)(B) and (C).

Florida's claim is that the federal government has both a constitutional and statutory duty to take action to protect it from the massive influx of illegal immigrants across its borders and that the United States is abdicating that duty by failing to effectively enforce existing immigration laws. Specifically, the Attorney General and the INS, as officers of the federal government, have expressly violated a duty owed to the states to adequately enforce immigration law and have forced Florida to take action to address the burden of illegal immigration.

In *Heckler v. Chaney*, 470 U.S. 821 (1985), this Court held that a federal officer's decision not to enforce a law in a particular case was a discretionary act unreviewable under the Administrative Procedure Act. Critically, however, the Court in *Heckler* noted that it was not confronted with a situation where the agency has " 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833, fn. 4. This case presents a claim

with specific factual support that the federal government has adopted a policy which amounts to an abdication of statutory obligations causing a breach of an underlying constitutional duty it owes to the states. Thus, this case therefore squarely raises the issue which this Court did not need to confront in *Heckler*, but now calls for resolution.

CONCLUSION

The district court below noted that:

> [T]he State of Florida is suffering under a tremendous financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws. The State of Florida is in desperate need of relief from this overwhelming burden it is being unfairly forced to bear . . . [A]s the State of Florida has already sought relief through the political process, the State may have no other method for obtaining relief from this burden. . . .

Chiles v. United States, 487 F.Supp. 1334, 1344 (S.D. Fla. 1994), *affirmed*, 69 F.3d 1094 (11th Cir. 1995). The district court was unquestionably correct in its above-quoted factual determinations. Both it and the court of appeals, however, erred grievously in determining that Florida's claim is non-justiciable and unavailing under the United States Constitution.

Florida's petition affords this Court an opportunity to remedy those flawed holdings and, in so doing, to address an issue of federalism which is of fundamental importance to both Florida and its sister states.

For the above-stated reasons, the *amici* states urge that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General
of the State of California
FLOYD S. SHIMOMURA
Senior Assistant Attorney General
RICHARD M. FRANK
Supervising Deputy Attorney General
LINDA A. CABATIC*
Supervising Deputy Attorney General
PAUL H. DOBSON
Deputy Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 324-5475

Attorneys for *Amici Curiae*

*Counsel of Record (Other Counsel Listed on Inside Cover).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

LAWTON M. CHILES, JR., GOVERNOR OF FLORIDA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MICHAEL JAY SINGER
ELLEN D. KATZ
Attorneys
Department of Justice
Washington, D. C. 20530
(202) 514-2217

24 pp

QUESTIONS PRESENTED

1. Whether the federal government, in its conduct of immigration policy, has violated a judicially enforceable duty to protect petitioners from "invasion" or to guarantee Florida a "Republican Form of Government" within the meaning of Article IV, Section 4 of the United States Constitution.

2. Whether federal immigration policy, coupled with Florida's constitutional obligation to provide education to the children of illegal immigrants on the same terms that apply to other residents, its provision of emergency medical care to illegal immigrants, and its enforcement of state criminal laws against illegal immigrants, violates the Tenth Amendment.

3. Whether petitioners have stated a judicially cognizable claim for violation of 8 U.S.C. 1103(a), which broadly delegates responsibility to the Attorney General to "control and guard the boundaries and borders of the United States against the illegal entry of aliens."

4. Whether petitioners' request for monetary relief is barred by the sovereign immunity of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1249

LAWTON M. CHILES, JR., GOVERNOR OF FLORIDA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 69 F.3d 1094. The opinion of the district court (Pet. App. B1-B24) is reported at 874 F. Supp. 1334.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1995. The petition for a writ of certiorari was filed on February 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners—Lawton M. Chiles, Jr., Governor of Florida; the State of Florida; the Dade County Public Health Trust Division; and the School Board of Dade County—seek review of a decision of the court of appeals affirming the district court's dismissal of their complaint against the United States and several federal officials. Petitioners' complaint in this case alleged that the United States had violated various constitutional and statutory provisions by failing to halt the entry of illegal immigrants into Florida. Petitioners sought injunctive, monetary, and declaratory relief. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the court of appeals affirmed.

1. Congress has vested primary authority for enforcement of the immigration laws in the Attorney General. Responsibility for many enforcement functions has, in turn, been delegated to the Commissioner of the Immigration and Naturalization Service (INS). See 8 U.S.C. 1103; 8 C.F.R. 2.1, 100.2(a); 28 C.F.R. 0.105(a). Aliens seeking to enter the United States are required to present themselves to INS officials at designated ports of entry, where they must establish their eligibility for admission into the country. 8 U.S.C. 1225; 8 C.F.R. 100.4, 235.1. Entry into the United States by an alien other than in the manner authorized by statute is a crime and a ground for deportation. 8 U.S.C. 1251, 1252, 1325.

For fiscal year 1995, Congress appropriated more than $800 million for INS's enforcement operating expenses. *Budget of the United States Government, Fiscal Year 1996*, Budget Appendix, at 646 (1996 Budget App.). More than 5,000 INS employees have

been assigned to the Border Patrol, at an annual cost estimated to exceed $400 million. *INS Fact Book: Summary of Recent Immigration Data* 34-36 (August 1995) (*INS Fact Book*). In 1994, the INS inspected more than 444 million persons; the Border Patrol apprehended more than one million deportable aliens; and close to 900,000 deportable aliens were apprehended at inspection points. 1996 Budget App. at 647. More than 1.2 million inadmissible aliens agreed to return to their homelands in 1993; INS expelled approximately 43,000 others through adjudicative proceedings. *INS Fact Book* at 27. Federal law also imposes a panoply of civil and criminal sanctions designed to enhance immigration control. For example, persons illegally bringing an alien into the United States are subject to imprisonment and a criminal fine, 8 U.S.C. 1324, and employers failing to check an alien employee's documents upon hire are subject to a civil penalty, 8 U.S.C. 1324a.

2. Illegal immigration is a subject of longstanding and continuing concern to both Congress and the Executive Branch. Congress enacted comprehensive reforms in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, which also authorized an additional $800 million in funding for the following two years for border patrol and inspection activities. IRCA § 111, 100 Stat. 3381. More recently, in the Justice Department's appropriations measure for fiscal year 1995, Congress included an appropriation for $130 million for the State Criminal Alien Assistance Program, see Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1778, a program that authorizes grants to the States to help

defray the costs of incarcerating illegal immigrants. See 8 U.S.C. 1365(a). Despite the massive efforts undertaken to control illegal immigration, however, it is undisputed that large numbers of illegal immigrants successfully elude the federal government's enforcement efforts each year.

3. a. Petitioners filed suit in the United States District Court for the Southern District of Florida (Miami Division), alleging that the United States had violated various constitutional and statutory provisions in the conduct of federal immigration policy. Count I concerned Florida's claim for payments under the Immigration Emergency Fund, see 8 U.S.C. 1101, a fund administered by the Attorney General. Pet. App. D27-D29. In Count II, petitioners alleged that the Attorney General had abdicated her responsibilities under 8 U.S.C. 1103(a) "to control and guard the boundaries and borders of the United States against the illegal entry of aliens." Pet. App. D30-D32. In Count III, petitioners alleged that Congress had acted unlawfully in failing to extend benefits to illegal aliens under the Medicaid and AFDC programs. *Id.* at D33-D35. In Count IV, petitioners alleged that federal immigration policy causes an influx of illegal immigrants into Florida in violation of the U.S. Constitution, Article IV, Section 4, which provides that the United States "shall protect each [State] against Invasion." They further alleged that federal immigration policy has resulted in a violation of Article IV, Section 4's requirement that the United States shall "guarantee to every State in this Union a Republican Form of Government." Finally, petitioners contended that federal immigration policy, coupled with Florida's constitutional obligation to provide education to the children of illegal immi-

grants and its decision to provide certain social, health, and correctional services to illegal immigrants, violates the Tenth Amendment. Pet. App. D36-D41.

b. The district court dismissed Count I of the complaint, holding that petitioners' claim was not yet ripe because Florida had not applied for relief pursuant to newly promulgated rules governing the Emergency Fund. Pet. App. B7-B8. With respect to Count II, the district court held that the Attorney General's decisions regarding the institution of deportation proceedings are "presumptively immune from judicial review," *id.* at B13, and that nothing in the governing statute served to rebut that presumption, *id.* at B14. In dismissing Count III, the court observed that any alteration of the incentives for illegal immigration could have serious consequences for this country's naturalization scheme, as well as for its relationships with foreign countries. *Id.* at B17. The court also noted that "[t]he State of Florida chose to participate in both Medicaid and AFDC" and therefore "must abide by the conditions of the programs, including the lack of funding for illegal aliens." *Id.* at B18. Finally, the district court dismissed Count IV of the complaint. *Id.* at B19-B23. Adjudication of petitioners' claims, the court recognized, would require a far-ranging review of federal immigration policy, including an assessment of the likely cost and effectiveness of alternative enforcement methods. In the absence of criteria enabling it to make such judgments, the court concluded that petitioners' claims raised non-justiciable political questions. *Id.* at B22-B23.

c. The court of appeals affirmed. Pet. App. A1-A5. The court held that petitioners' statutory claim was

unreviewable, explaining that "Congress intended whether the Attorney General is adequately guarding the borders of the United States to be 'committed to agency discretion by law,'" *id.* at A3 (quoting 5 U.S.C. 701(a)), and that 8 U.S.C. 1251(a) "expressly gives the Attorney General discretion whether to deport a particular alien," Pet. App. A3. The court also held that the district court had properly dismissed Count III, regarding Medicaid and AFDC limits, "because no specific constitutional limit on the spending power ha[d] been exceeded by the reimbursement policies of AFDC and Medicaid." *Id.* at A4. Finally, the court affirmed the dismissal of Count IV, holding that petitioners' Invasion and Guarantee Clause claims presented non-justiciable political questions, *id.* at A4-A5, and that the State's provision of various services to illegal aliens was "not the product of federal coercion of the kind which violates the Tenth Amendment," *id.* at A5.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals.[1] Further review is not warranted.

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[1] The court of appeals' decision is also consistent with the rulings of all the district courts that have considered these or similar questions. See *California* v. *United States*, No. 94-0674-K (S.D. Cal. Mar. 3, 1995), appeal pending, No. 95-55490 (9th Cir.); *Arizona* v. *United States*, No. 94-0866 PHX SMM (D. Ariz. Apr. 18, 1995), appeal pending, No. 95-15980 (9th Cir.); *Padavan* v. *United States*, No. 94-CV-1341 TJM DNH (N.D.N.Y. Apr. 18, 1995), appeal pending, No. 95-6156 (2d Cir.); *New Jersey* v. *United States*, No. 94-3471(GEB) (D.N.J. Aug. 2, 1995), appeal pending, No. 95-5685 (3d Cir); *Texas* v.

1. a. Petitioners contend that by failing to halt the influx of illegal immigrants into Florida, the federal government has breached its constitutional duty to "protect each [State] against Invasion." U.S. Const. Art. IV, § 4. As both the district court and the court of appeals recognized, that claim presents a non-justiciable political question. Pet. App. A4-A5, B20-B22; see generally *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Admission of aliens into the United States and control over the borders are matters firmly entrusted to the political branches. See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). Similarly, protection of the United States from illegal immigration implicates matters of foreign policy and defense into which courts will intrude only with the greatest reluctance. See, *e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 114 S. Ct. 2268, 2284-2285 (1994).

The Constitution provides no "judicially discoverable and manageable standards for resolving" petitioners' claim. *Baker* v. *Carr*, 369 U.S. at 217. The Constitution provides no criteria either for determining when a peacetime influx of immigrants has risen to the level of an "invasion," or for assessing the adequacy of the federal government's response to such a threat. As the district court explained, adjudication of petitioners' claims would require a court to "review the * * * entire enforcement of Federal immigration laws including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those additional resources should be

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United States, No. B-94-228 (S.D. Tex. Aug. 7, 1995), appeal pending, No. 95-40721 (5th Cir.).

allocated." Pet. App. B22. The court noted that it was "unable to identify satisfactory criteria for making these determinations," *ibid.*, and correctly concluded that such decisions "should be left to the Legislative and Executive branches of government," *id.* at B23. Accord *Barber* v. *Hawaii*, 42 F.3d 1185, 1198-1199 (9th Cir. 1994) (assertion that a State has been invaded within the meaning of Art. IV, § 4 presents "a non-justiciable political question").

b. For essentially the same reasons, the courts below were correct in dismissing petitioners' Guarantee Clause claim. In *New York* v. *United States*, 505 U.S. 144, 184 (1992), this Court observed that "[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." Although the Court in *New York* suggested that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," it refrained from "resolv[ing] this difficult question," *id.* at 185, and cast no doubt on prior decisions holding Guarantee Clause claims to be non-justiciable.

As the courts below held, petitioners' Guarantee Clause claim presents a non-justiciable political question. There is no standard that would enable a court to determine "when the migration, as well as the costs associated with such migration, reaches the point at which it invades the State of Florida's state sovereignty." Pet. App. B22; see, *e.g.*, *Lincoln* v. *Vigil*, 113 S. Ct. 2024 (1993). Because no judicially manageable standards are available to guide such an inquiry, petitioners' claim is not subject to judicial review. See Pet. App. A4.

Even if petitioners' claim were deemed justiciable, moreover, it is lacking in merit. In *New York* v. *United States*, this Court assumed, *arguendo*, that "the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute." 505 U.S. at 186. It rejected the State's claim on the merits, however, because the challenged statutory provisions "d[id] not pose any realistic risk of altering the form or the method of functioning of New York's government." *Ibid.* The Court observed that the statute in question, which required that States provide for the disposal of certain wastes generated within their borders, offered the States "a legitimate choice rather than issuing an unavoidable command." *Id.* at 185. The statute did not violate the Guarantee Clause because the States "retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate." *Ibid.*

Similarly here, petitioners have failed to establish that the Florida legislature is unable to set its own agenda or that state officials are no longer accountable to the electorate. Petitioners identify no federal legislation that requires Florida to take any particular action with respect to illegal immigrants. The State's obligation to enforce its criminal laws against illegal immigrants stems from ~~the~~ its own laws, not from any federal command. The requirement imposed by the Fourteenth Amendment that States make primary and secondary education available to the children of illegal immigrants on the same terms that apply to other residents, see *Plyler* v. *Doe*, 457 U.S. 202, 230 (1982), cannot constitute a violation of the Guarantee Clause. And while federal law requires Florida to provide emergency medical care to illegal

immigrants, that obligation is the consequence of the State's voluntary decision to participate in the Medicaid program, not the result of any federal command. See *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990).[2]

2. Petitioners' Tenth Amendment claim is similarly without merit. Under this Court's Tenth Amendment jurisprudence, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York* v. *United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). See also *United States* v. *Lopez*, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring) (*New York* v. *United States* involved "a formal command from the National Government directing the State to enact a certain policy"). Petitioners, however, identify no federal directive to the States regarding the treatment of illegal aliens, much less a directive that would commandeer the State's legislative or policy-making apparatus. The federal immigration policies at issue in this case do not require petitioners to enact or enforce a federal regulatory program. As the court of appeals held, "Florida's provision of benefits to illegal aliens is not the product of federal coercion of the kind which violates the Tenth Amendment." Pet. App. A5.

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[2] States choosing to participate in the Medicaid program are reimbursed with federal funds for a percentage of their costs in providing medical services to the needy. See 42 U.S.C. 1396 *et seq.* A State that wishes to receive Medicaid funds must provide emergency (but not non-emergency) medical services to illegal aliens. 42 C.F.R. 440.255(c).

Florida's expenditure of funds to incarcerate illegal immigrants convicted of state felonies does not establish a Tenth Amendment violation. The Tenth Amendment is implicated when the federal government requires a State to take action; no Tenth Amendment concern arises when the federal government leaves a State free to exercise its own sovereignty and implement its own legislative and policy choices. Nor can the Tenth Amendment be violated by the requirement that Florida make public primary and secondary education available to the children of illegal immigrants on the same terms that apply to other residents. As noted above, that requirement is imposed directly by the Fourteenth Amendment. See *Plyler* v. *Doe*, *supra*. The Tenth Amendment does not insulate States from obligations imposed by other constitutional provisions. See *Puerto Rico* v. *Branstad*, 483 U.S. 219, 228 (1987) (when a duty "is directly imposed upon the States by the Constitution itself, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment."). The Tenth Amendment precludes the federal government from usurping powers reserved to the States. It does not impose an affirmative duty on the federal government to defray the costs of obligations imposed on the States directly by the Constitution.

Petitioners contend that the federal government has violated the Tenth Amendment by requiring them, through their participation in the Medicaid program, to provide emergency care to illegal immigrants. As noted above, however, Medicaid is a voluntary program in which States may decline to participate. Federal actions that "encourage" or

"provide incentives" for States to adopt certain policies do not violate the Tenth Amendment. See *New York* v. *United States*, 505 U.S. at 174-176. In exercising its powers under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, Congress may "attach conditions on the receipt of federal funds." *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Although those conditions "may influence a State's legislative choices," such influence does not violate the Tenth Amendment. *New York*, 505 U.S. at 167. "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Dole*, 483 U.S. at 211 (quoting *Stewart Mach. Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937)). Florida has voluntarily elected to participate in the Medicaid program, presumably concluding that its benefits outweigh its costs; it may not evade those costs by characterizing them as the product of unlawful coercion.[3]

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[3] Petitioners allude in passing (Pet. 12) to the purported "absence of political mechanisms or incentives by which the underlying legal and constitutional deficiencies might be righted." This Court has held, however, that state interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). Although *Garcia* left open the possibility that "extraordinary defects" in the political process could render congressional regulation invalid, see *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988), petitioners have not alleged any such defect. They have not been "deprived of any right to participate in the national political process * * * [nor have they been] singled out in a way that left [them] politically isolated and powerless." *Id.* at 513. Indeed, recent legislation provides a mechanism whereby States can obtain compensation for the costs of incarcerating undocumented aliens convicted of certain crimes.

3. In addition to their constitutional claims, petitioners contend that the Attorney General and the INS Commissioner have breached a non-discretionary statutory obligation to guard and control the borders of the United States. They rely (see Pet. 25) on 8 U.S.C. 1103(a), which states that the Attorney General "shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." As the courts below held, that claim is not subject to judicial resolution. Pet. App. A3, B12-B14.

The Administrative Procedure Act (APA) precludes judicial review of matters "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Judicial review is precluded "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). Decisions not to take enforcement action "should be presumed immune from judicial review." *Id.* at 832.

As the courts below noted, this case, like *Chaney*, involves actions and decisions that are presumptively unreviewable. Pet. App. A3, B12-B14. Both the formulation of immigration policy generally, and the decision whether to seek to deport a particular alien, "require[] a complicated balancing of factors which are peculiarly within the Attorney General's expertise." Pet. App. B13. The governing statute provides no standard by which a court could determine whether the Attorney General has adequately controlled immigration into Florida, or whether resources should be directed to that problem at the

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See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20301, 108 Stat. 1823.

expense of the other obligations of the federal government.[4] To the contrary, Section 1103(a) provides that the Attorney General shall exercise her statutory responsibilities in such manner "as to [her] shall appear necessary and proper."

Chaney left open the possibility that an agency's non-enforcement decision might be reviewable "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)). Although petitioners allege (Pet. 25) that such abdication has occurred, they offer no more than conclusory assertions that are legally insufficient to support their claim. See, *e.g.*, *Neitzke* v. *Williams*, 490 U.S. 319, 326 (1989). Indeed, the federal government's extensive efforts to enforce the immigration laws demonstrate that there has been no abdication of federal responsibility. The federal government expends more than a billion dollars annually in its efforts to address the problem of illegal immigration. More than one million immigrants annually are apprehended and returned to their homelands, either voluntarily or through the administrative and judicial process. Stripped of hyperbole, petitioners' argument is simply that the federal government should do something more or different. Petitioners have not established any legal entitle-

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[4] The legislative history of Section 1103(a) indicates that it simply delineates the respective functions of the Attorney General and the Secretary of State, who also has responsibilities in this area, including the issuance of passports and visas. See H. R. Rep. No. 1365, 82d Cong., 2d Sess. 35 (1952).

ment to relief from the courts on the basis of the Attorney General's conduct of her office.

4. Finally, petitioners contend (Pet. 27-30) that the Court should grant certiorari to consider questions concerning appropriate relief. Because the courts below dismissed the suit for failure to state a claim, they did not consider what remedies would have been appropriate if petitioners' action had been successful. The remedial question presented by the petition is therefore unsuitable for this Court's resolution.

Even if petitioners had prevailed on the merits, however, their claims for monetary relief would be barred by the sovereign immunity of the United States. It is well settled that suits against the federal treasury are barred unless Congress has expressly waived sovereign immunity. *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983); *United States* v. *Testan*, 424 U.S. 392, 400 (1976). Petitioners rely (Pet. 28) on the waiver of sovereign immunity contained in the APA, 5 U.S.C. 702. Section 702, however, applies only to actions "seeking relief other than money damages." Although the equitable authority conferred by Section 702 may in some instances encompass monetary relief, see *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), no such relief would be available here. *Bowen* involved a challenge to a federal administrative ruling that disallowed a State's request for federal payments allegedly due it under the Medicaid statute. See 487 U.S. at 886-887. The Court construed Section 702 as incorporating the traditional distinction between money damages and "specific relief," as well as the principle that specific relief may include "the recovery of specific property or monies." 487 U.S. at 893 (quoting *Larson* v. *Domestic & Foreign Com-*

merce Corp., 337 U.S. 682, 688 (1949)) (emphasis omitted). As the Court explained, "[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." 487 U.S. at 895 (internal quotation marks omitted).

In *Bowen*, the monies sought were properly regarded as specific relief because the Medicaid statute mandated the payment of money under specified circumstances. Thus, the State's APA action was "a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900. Here, by contrast, petitioners do not seek to enforce a statutory entitlement to receive money from the federal government. Rather, they seek a judicially-created mandate for payments that were never authorized by Congress. Petitioners' claims fail because "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)). See also *DIA Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1266-1267 (3d Cir. 1994); *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994). Cf. *Marshall Leasing, Inc.* v. *United States*, 893 F.2d 1096, 1098-1100 (9th Cir. 1990) (allowing action for return of a seized automobile to proceed under Section 702 but holding that the plaintiff would be required to drop his alternative claim for monetary compensation for the car's value). Section 702 permits only specific monetary relief, and does not authorize the courts to reallocate the federal budget.

Nor can petitioners advance their argument by styling their claim (see Pet. 28) as one for "restitu-

tion." Cf. *Northern Cheyenne Tribe* v. *Lujan*, 804 F. Supp. 1281, 1287-1288 (D. Mont. 1991). The essence of a "restitution" claim is that it is based not simply on proof of loss to the plaintiff, but on gain to the defendant, which the latter is ordered to "restore." See Dan B. Dobbs, *Handbook on the Law of Remedies* 222-223 (1973). Petitioners, however, do not seek to recover payments made to the federal government. Any payment made to the petitioners by the United States to compensate for payments to third parties could not be characterized as restitution. Rather, it would be a form of compensatory damages outside the scope of Section 702.[5]

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[5] No statute other than the APA could plausibly be thought to provide a waiver of sovereign immunity for money damages in this case. Congress has enacted no general waiver of immunity for money claims based on alleged violations of constitutional rights. *Testan*, 424 U.S. at 401. The Tucker Act is inapplicable here, since petitioners can point to no contract with the United States, do not "seek the return of money paid * * * to the Government," and can point to no "federal statute [that] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). In any event, because petitioners seek well over $10,000, any Tucker Act suit could have been brought only in the Court of Federal Claims. See 28 U.S.C. 1346.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MICHAEL JAY SINGER
ELLEN D. KATZ
Attorneys

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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

LAWTON M. CHILES, JR., *et al.*, *Petitioners,*

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THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals, Eleventh Circuit

BRIEF OF *AMICUS CURIAE* STATE OF TEXAS IN SUPPORT OF FLORIDA'S PETITION FOR WRIT OF CERTIORARI

DAN MORALES
Attorney General of Texas
JORGE VEGA
First Assistant Attorney General
JAVIER AGUILAR
Special Assistant Attorney General
DEBORAH A. VERBIL
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2191
Fax: (512) 463-2063

April 1996 ATTORNEYS FOR AMICUS CURIAE

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Brief of Amicus Curiae State of Texas In Support of Florida's Petition for Writ of Certiorari

I. Interest of Amicus

In 1993, the State of Texas, along with Texas cities, counties, school districts, and hospital districts, spent approximately $1,340,603,717 in providing health, education, and criminal justice services to illegal immigrants. The state and its political subdivisions have spent similar amounts since 1988.

Like Florida, Texas has tried, but has been unable, to obtain relief through the political process. And, like Florida, Texas has turned to the courts for help. Texas' case was dismissed by the district court and is now pending before the U.S. Fifth Circuit Court of Appeals. *See Texas v. United States*, No. B-94-228 (S.D. Tex. Aug. 7, 1995), *appeal docketed,* No. 95-40721 (5th Cir. Sept. 15, 1995). Because Florida's claims present similar issues regarding the structure of federalism and a state's ability to enforce the guarantees of state sovereignty in federal court, Texas supports Florida's petition for writ of certiorari.

II. Reasons for Granting the Writ

A. Texas and its political subdivisions pay the costs of federal immigration policies.

Texas acknowledges the positive long-run economic and social contributions that immigrants have made, and will continue to make, to the United States and Texas. These long-run

contributions, however, come at a considerable price in the short run: a price paid by Texas.

Despite the efforts of the United States Congress to control immigration by enacting extensive immigration legislation in 1986[1] and 1990[2], undocumented immigrants continue to enter and to reside in Texas.[3] Texas and its political subdivisions must provide health services, primary and secondary education, and correctional resources to satisfy their obligations to provide for the health, safety, and welfare of their residents.

The United States has consistently acknowledged its constitutional duty to control illegal immigration, as well as its failure to do so. In 1994, the United States House of Representatives passed the following concurrent resolution:

> The Congress finds that
>
> (a) the Federal Government is solely responsible for setting and enforcing national immigration policy;
>
> (1) the Federal Government has not adequately enforced immigration laws;

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[1] Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (1970 & Supp. 1996).

[2] Immigration and Naturalization Act, 8 U.S.C. § 1101 (1970 & Supp. 1996).

[3] In addition to Texas, the other states most affected by immigration are Florida, California, New York, New Jersey, Illinois, and Arizona. *See* REBECCA L. CLARK, ET AL., FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES (1994).

(2) this weak enforcement has imposed financial costs on State and local governments;

(3) States must incur costs for incarcerating undocumented persons convicted of State and local crimes, educating undocumented children, providing emergency medical services to undocumented persons, and providing services incidental to admission of refugees under the Refugee Admissions and Resettlement Program; and

(4) the Federal Government has an obligation to reimburse State and local governments for costs resulting from the costs described in paragraph (3).[4]

Moreover, the Second Report of the United States House of Representatives Committee on Government Operations[5] observes:

> Unfortunately, INS has not done a good job (in controlling illegal immigration). As reflected in this report, people are unhappy with the quality of

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[4] H. Con. Res. 218, 103d Cong., 2d Sess., 140 CONG. REC. 1210 (1994) (Sec. 35), (entitled "Concurrent resolution setting forth the congressional budget for the United States Government for the fiscal years 1995, 1996, 1997, 1998, 1999).

[5] House Comm. On Government Operations, The Immigration and Naturalization Service: Overwhelmed and Unprepared for the Future, H.R. Doc. No. 216, 103d Cong., 1st Sess. 2-3 (1993).

> both the enforcement and service functions performed by the agency. In addition, in recent years, government auditors have issued numerous reports identifying management inefficiencies throughout the INS. Their findings have been so consistently negative and the problems so pervasive that in the 1992 Department of Justice annual report..., the (INS) was identified as the Department's No. 1 "high risk" area.
>
> In States and localities most affected by immigration, the presence of undocumented immigrants has placed growing burdens on service delivery systems--health care, education, and public protection. Their citizens recognize the consequences of the failure of INS to stem the flow of illegal immigration.

In January 1994, the Department of Justice admitted that its enforcement to prevent the flood of undocumented immigrants was "weak" when it requested $540 million in additional funding for its "strategy to control the border" to "stop the revolving door."[6]

Between FY90 and FY93 the U.S. Border Patrol reported the apprehension of 1,914,778 undocumented persons in Texas who had "entered without inspection."[7] INS estimates that two undocumented immigrants evade interdiction for every undocumented alien apprehended. INS further estimates that

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[6] Ana Cobiar, U.S. Immigration and Naturalization Service spokesperson, FY 1995 Immigration Initiative (press release).

[7] BORDER PATROL, IMMIGRATION AND NATURALIZATION SERVICE, DEPORTABLE ALIENS & OTM'S, TEXAS BORDER SECTORS - FY 90 TO FY 93.

only half of the undocumented immigrants residing in the United States enter by slipping across the border; the other half of the undocumented immigrants reside in the United States in violation of their visas.

In addition, the federal government's immigration policy benefits the federal government because it receives substantial federal tax revenues from the undocumented immigrants. According to a recent study[8], undocumented immigrants residing in Texas pay the following amounts in federal taxes annually:

Federal Income Tax	$58,850,000
Federal Excise Tax	20, 900,000
FICA	311,850,000
Federal Gasoline Tax	17,600,000
TOTAL	$409,200,000

Thus, the federal government benefits not only by collecting taxes but also by refusing to take responsibility for the financial consequences of federal immigration policy.

Texas and its political subdivisions expended approximately $534 million in 1993 in providing human services benefits to undocumented immigrants in order to preserve and protect the public health and welfare. Similar yearly costs have been incurred since 1988.

In addition, illegal immigration has substantially increased the cost of criminal justice to Texas, including the cost to law enforcement, to the judiciary, and to the penal system. The

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[8] JEFFREY S. PASSEL, IMMIGRANTS AND TAXES: A REAPPRAISAL OF HUDDLE'S "THE COST OF IMMIGRANTS," (The Urban Institute, January 1994).

financial consequences of federal immigration policy on these criminal justice areas cost Texas and its political subdivisions approximately $183 million in 1993. Similar yearly costs have been incurred since 1988.

Finally, the state must provide free education to illegal immigrants of school age. *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1982).[9] The financial consequences of federal immigration policy cost Texas approximately $624 million in 1993. Similar yearly costs have been incurred since 1988.

B. Florida's claims raise important issues regarding state sovereignty and the structure of federalism under the Tenth Amendment and the Guarantee Clause.

Texas concurs with Petitioner Florida and the Amici States, including California, that this case presents important issues regarding the structure of federalism and the availability

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[9] In *Plyler*, the Supreme Court noted the unfairness of the federal government's imposing the costs of educating the children of illegal immigrants on state and local governments:

> It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here.

Id. at 2408 (Burger, C.J., dissenting).

of judicial review. Texas agrees that the political question doctrine does not bar this action. Texas further agrees that Florida's claims under the Guarantee Clause, the Tenth Amendment, and the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.*, merit consideration by this Court.

In the interest of brevity, Texas will not repeat those arguments, but joins in the arguments presented by both Petitioner and the other Amici. Texas points out, however, that it has not asserted a claim under the Invasion Clause of Art. IV, § 4, in its suit. For that reason, it does not join in Florida's and the Amici's arguments regarding the applicability of that provision.[10]

C. This Court's recent decision in *Seminole Tribe v. Florida* affirms the importance of Florida's claims regarding the structure of federalism.

In *Seminole Tribe v. Florida*, No. 94-12, 1996 WL 134309 (U. S. March 27, 1996), this Court again emphasized that

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[10] Texas' claims differ from Florida's in two significant respects. First, Texas' claims are grounded in the federal government's exclusive power to control immigration granted by Article I, section 8 of the U.S. Constitution (the "Naturalization Clause").

Texas alleges that the Naturalization Clause imposes on the federal government a constitutional duty to pay for the consequences of federal immigration policies, regardless of what those policies are, and regardless of the level at which the federal government chooses to enforce those policies.

Second, Texas' suit does not allege a violation of the "invasion" clause. Texas believes that the federal government is responsible for all the costs of its immigration policies, regardless of whether immigration is legal or illegal.

"each State is a sovereign entity in our federal system." *Id.* at *4.

Seminole dealt with the states' immunity from suit under the Eleventh Amendment. In holding that the Eleventh Amendment limits federal courts' jurisdiction under Article III, the Court noted that "(t)he [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Id.* at *4, *citing Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

Florida's claims bring another aspect of state sovereignty to this Court's attention, *i.e.*, a state's right, protected by the Tenth Amendment and the Guarantee Clause, to be free from coercion by the federal government. Because this issue is of fundamental importance to Texas, as well as other states disproportionately affected by federal immigration policies, Texas urges this Court to grant certiorari in this case.

III: Conclusion

For the reasons stated, Amicus, the State of Texas, asks this Court to grant Florida's petition for writ of certiorari.

Respectfully submitted,

DAN MORALES
Attorney General of Texas
JORGE VEGA
First Assistant Attorney General
JAVIER AGUILAR
Special Assistant Attorney General
DEBORAH A. VERBIL
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2191
Fax: (512) 463-2063

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ATTORNEYS FOR AMICUS CURIAE

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No. 95-1249

IN THE

Supreme Court of the United States

October Term, 1995

LAWTON M. CHILES, JR., et al.,

Petitioners

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ROBERT A. BUTTERWORTH
Attorney General of Florida

LOUIS F. HUBENER
Assistant Attorney General
(Counsel of Record)
ANA CRISTINA MARTINEZ
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050
(904) 488-9935

PARKER D. THOMSON
Special Assistant Attorney General
CAROL A. LICKO
Special Assistant Attorney General
One S.E. Third Avenue, Suite 1700
Miami, FL 33131
(305) 350-7200
(Counsel for the State of Florida and Governor Lawton M. Chiles, Jr.)

1 APP

QUESTIONS PRESENTED

Respondents' brief in opposition restates the questions presented for review. As stated in the petition for a writ of certiorari, the questions presented are:

> 1. Whether the respondent officials of the national government violate Article IV, §4 and the Tenth Amendment when they pursue policies that permit exorbitant numbers of illegal aliens to enter a tiny minority of states, and fail to make equitable restitution of the huge and disproportionate costs thereby imposed on those states and their political subdivisions.
>
> 2. Whether a claim that the Attorney General and other officials of the national government have violated the immigration laws by adopting and pursuing a general policy that is so extreme as to amount to an abdication of statutory responsibilities presents a question committed to agency discretion by law.

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REPLY TO RESPONDENTS' STATEMENT

Respondents rely on a number of statistics from the *INS Fact Book: Summary of Recent Immigration Data* 34–36 (August 1995) to make it appear as if the national government is now making a concerted effort to control illegal immigration. They claim to have "expelled" approximately 43,000 aliens "through adjudicative proceedings" in 1994 (although it is not clear that this number of persons actually left the United States). However, the INS estimates there are 3.4 million illegal immigrants living in the United States and that this number increases by almost 300,000 every year.[1] If 43,000 represents an annual "expulsion" figure, the government expels less than 1.26% of the total illegal population every year. Moreover, 43,000 is only a small fraction of the

1 *See* Clark, Passel, Zimmerman & Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (1994) at ii, 5–6.

annual *increase* in the resident illegal alien population. Plainly, Florida's already massive expenditures will only increase.

Although Congress has appropriated money to assist states with incarceration costs, as respondents point out, the amount is no more than a token. Respondents' facts admit what the petition asserted: that the national government's *total* annual enforcement expenditures of $1.2 billion scarcely exceed what illegal immigration annually costs Florida *alone*.

REPLY TO RESPONDENTS' ARGUMENT

The brief in opposition essentially denies that Florida suffers any burden that it has not chosen to assume or that is not constitutionally compelled. Ultimately, it concludes that *whatever* the reason for Florida's burdens, sovereign immunity precludes recovery. The issues are not so simple and they cry out for definitive resolution.

1. Respondents erroneously maintain that there are no judicially manageable standards for resolving petitioners' claims under the Guarantee Clause and the Tenth Amendment. This argument assumes the Guarantee Clause means nothing, at least until a state's governmental processes actually break down; and that despite the Tenth Amendment the national government has the right to effectively conscript *some portion* of a state's resources. *If* the constitutional question is one of degree, it is certainly not beyond judicial competence. As Justice Kennedy recently made clear with respect to interpretation of the Commerce Clause:

> Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution.

United States v. Lopez, 115 S.Ct. 1624, 1637 (1995) (Kennedy, J., joined by O'Connor, J., concurring) (quoting *Wickard v. Filburn*, 317 U.S. 111, 123 n. 24 (1942)).

The generality of the Constitution's "great concepts" is not confined to the Commerce Clause. The Constitution does not tell us what "just compensation" means; it does not tell us what racial mixture distinguishes a desegregated school system from a segregated school system; nor does it tell us the precise constitutional limitation on contributions by individuals to political campaigns.[2] Likewise, it does not tell us at what exact point support flowing indirectly to a religious institution crosses the bounds of permissibility and becomes an Establishment Clause violation.[3]

Where, as here, the controlling principles are clear, judicially manageable standards exist. It is the task of this Court to recognize those principles, as clearly formulated in the petition for certiorari, and apply them on a case-by-case basis. There should be no difficulty of application in this case, where the extreme facts establish violations of both the Guarantee Clause and the Tenth Amendment. The respondents are really saying that no matter how onerous the burdens that befall a state because of the national government's accommodation of illegal immigration, a court can never find a violation of Article IV, §4, or the Tenth Amendment. It matters not to their reading of the Constitution how many billions of dollars a state must pay to support this national policy. This Court, however, is fully capable of determining that such burdens cannot be heedlessly thrust upon a state; and that Florida and other states similarly situated are not agents of the national government whose resources may be conscripted without accountability.

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2 *See, e.g., Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. February 7, 1995) (No. 95-1258).

3 *Compare Mueller v. Allen*, 463 U.S. 388 (1983), *with Committee for Public Education v. Nyquist*, 413 U.S.756 (1973).

2. Respondents also misconstrue this Court's Guarantee Clause analysis in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992), and therefore misunderstand *New York's* relevance to this case. Contrary to respondents' too hasty analysis, this Court did not hold that the "take title" statutory provision did not violate the Guarantee Clause. Rather, having held that provision invalid under the Tenth Amendment, the Court had no occasion to consider its validity under the Guarantee Clause. The Court considered the applicability of the Guarantee Clause only to two other provisions of the challenged statute, finding that each offered states a "legitimate choice" rather than an "unavoidable command." 112 S.Ct. at 2433.

Florida has not been offered a choice. Hence, the constitutional claim asserted in this case is most closely analogous to the "commandeering" claim sustained on the merits in *New York v. United States*—not, as respondents erroneously assert, to the claims found to lack merit under the Guarantee Clause.

In emphasizing that no Congressionally enacted statute directly exerts a coercive, commandeering force on the state's political process, respondents entirely ignore the *practical* compulsion to which Florida is subject. The decision to neither effectively enforce the immigration laws nor assist the burdened states is an exercise of power irrespective of the absence of legislation. The state's choice, as the district court recognized, is a "Hobson's choice"—that is, no choice at all. It may be surmised that respondents fail to refute this central point for the simple reason that it is irrefutable. For all practical purposes, Florida has been coerced, and its political process has been commandeered.

Respondents are also far too hasty with their contention that, as a result of *Plyler v. Doe*, 457 U.S. 202 (1982), a state's obligation to educate undocumented alien children is strictly a matter of Fourteenth Amendment jurisprudence. In *Plyler*, this Court plainly left it open to Congress to relieve the states

of this burden, 457 U.S. at 224–226, and five Justices voiced the opinion that the national government had an obligation to assume educational expenses for illegal aliens. *Id.* at 241 and 242 n. 1. Although from time to time the issue has become a political football, the fact remains that Congress has done virtually nothing to assist the affected states.

Respondents' reasoning turns a blind eye to the basic fact that if the national government chose to enforce the immigration laws Florida's expenditures for education and law enforcement on behalf of its alien population would not be necessary. *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), thus cannot support respondents' interpretation of the Tenth Amendment. That case concerned only the Extradition Clause and the constitutional obligation of states to deliver up fugitives, an obligation that cannot, by federal design and policy, be turned into a crushing burden for a few disfavored states.

Respondents completely misapprehend petitioners' claims for health care costs. Public hospitals and other health care facilities do not incur costs for providing care to illegal aliens because Florida participates in the Medicaid program. They incur costs because they have no choice but to provide necessary medical treatment, much of which cannot be reimbursed by Medicaid. Given that Florida's 350,000+ undocumented aliens are a permanent and growing class, there is no more choice in this matter than there is in paying the costs of education and incarceration. All of Florida's claims for restitution are grounded in the Tenth Amendment and Article IV, section 4.

Petitioners must also correct the plain misstatement that Florida pleaded no defect in the political process. (Resp. Br. at 12, n.3) Petitioners pleaded precisely that in the complaint. (¶¶ 61–64, Pet. App. D 26–27) The district court's order acknowledged the failure of the political process. (App. B 23)

3. Respondents misconstrue petitioners' statutory claims. Petitioners have never denied that the relevant immigration

statutes confer a range of enforcement discretion on the Attorney General. Petitioner's claim, instead, is that the Attorney General's nonenforcement policies amount to default of a "duty" to enforce the law imposed by the plain language of 8 U.S.C. §1103(a), and thus lie beyond the scope of discretion conferred. Claims that a United States official has exceeded the scope of discretion conferred are and must be actionable under well settled principles of administrative law. They simply do not come within the exception to reviewability for actions committed by law to agency discretion. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

4. Respondents attempt to evade the argument that the Attorney General's policies lie beyond the scope of lawful discretion by dismissing petitioners' pleadings as "conclusory assertions." Tellingly, however, respondents fail to deny any of the specific pleadings supporting the petitioners' arguments. Moreover, petitioners in the trial court sought discovery of respondents' specific policies toward illegal immigrants in Florida. Respondents refused to answer Florida's interrogatories, instead seeking and obtaining a protective order. Respondents thus fail to recognize that this case comes before this Court on the grant of a motion to dismiss for failure to state a claim on which relief could be granted, and the court of appeals' affirmance thereof, *all prior to discovery*. At this stage of the case, respondents cannot object that petitioners' factual assertions are conclusory. On the contrary, it is well settled that petitioners' assertions must be accepted as *true*.

5. Finally, all else failing, respondents assert their supposed sovereign immunity, contending that Florida's claims are for damages, not restitution. As respondents themselves recognize, neither the district court nor the court of appeals addressed questions relating to sovereign immunity, and this Court need not do so either. It could grant the petition, reverse the lower courts on the substantive questions presented, and remand the case for consideration of available remedies. Petitioners' contention with respect to remedies is

only that if the Court were to reach this question—as it clearly need not do—the doctrine of sovereign immunity would not preclude the award of effective relief and thereby render the Court's substantive judgment effectively unenforceable.

In any event, respondents' reasoning is not persuasive. Control of immigration is the exclusive responsibility of the national government, and therefore Florida's claim is certainly for restitution, not damages. *See Restatement of Restitution* §1 Unjust Enrichment and §115 Performance of Another's Duty to the Public. As respondents point out, the essence of a restitution claim rests on gain to the defendant as well as proof of loss to the plaintiff. Dan R. Dobbs, *Handbook on the Law of Remedies* 222–223 (1993). In paying for our national policy of accommodating illegal immigration, Florida's losses are clearly a gain for the national government, both financially and politically.

Moreover, this case involves a prayer for alternative remedies, including ones which would require payment out of the national treasury. Plainly, this case does not present a quotidian claim for breach of contract or personal injury and the cases respondents cite should not be considered controlling. As this Court has recognized, there are cases in which sovereign immunity must give way. This case is about our constitutional and federal structure. It is about political accountability. And finally it is about whether the respondents may compel one state—and perhaps six others—to bear a burden that the Constitution says should be shared by all. The doctrine of sovereign immunity does not place the national government above the Constitution's commands.

CONCLUSION

The petition for a writ of certiorari should be granted and this case addressed on its merits.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General of Florida

LOUIS F. HUBENER
Assistant Attorney General
Counsel of Record
Florida Bar No. 0140084

ANA CRISTINA MARTINEZ
Assistant Attorney General
Florida Bar No. 0851655

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050
(904) 488-9935

PARKER D. THOMSON
Special Asst. Attorney General
Florida Bar No. 081255
CAROL A. LICKO
Special Asst. Attorney General
Florida Bar No. 435872
One S.E. 3rd Avenue, Ste. 1700
Miami, FL 33131
(305) 350-7200
Counsel for the State of Florida, and
Governor Lawton M. Chiles, Jr.

W. DEXTER DOUGLASS
Florida Bar No. 0020263
Executive Office of the Governor
Room 209, The Capitol
Tallahassee, FL 32399-0001
(904) 488-3494
Counsel for Governor Lawton M. Chiles, Jr.

PHYLLIS O. DOUGLAS
Florida Bar No. 126915
School Board of Dade Co., FL
1450 N.E. 2nd Ave. Room 301
Miami, FL 33131
(305) 995-1304
Counsel for School Bd. of Dade Co., FL

SARA A. PRICE
Florida Bar No. 831425
Public Health Trust Division
1611 N.W. 12th Avenue
West Wing 109
Miami, FL 33136
(305) 585-1313
Counsel for Dade County Public Health
Trust Division